

United States 9
Circuit Court of Appeals
For the Ninth Circuit.

FREDERIC A. CLARKE, sometimes known as
FREDERICK A. CLARKE,

Appellant,

vs.

FEDERAL TRADE COMMISSION,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

JAN - 7 1942

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

OLIVER O. CLARK, Esq.,
ELDON V. SOPER, Esq.,
1203 Garfield Building,
Los Angeles, California.

For Appellee:

W. T. KELLEY, Esq.,
Chief Counsel of the
Federal Trade Commission,

MERLE P. LYON, Esq.,
Special Assistant to Chief Counsel,
Federal Trade Commission,
Washington, D. C. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the Southern District of California

No. 1553-BH

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

FREDERICK A. CLARKE,

Defendant.

APPLICATION FOR AN ORDER REQUIRING
THE GIVING OF EVIDENCE

To the Honorable Judges of the District Court of
the United States for the Southern District of
California:

The Federal Trade Commission (hereinafter referred to as the petitioner), pursuant to authority conferred upon it by the provisions of Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U. S. C. A., Sec. 49), respectfully applies to this Honorable Court for an order requiring Frederick A. Clarke to appear before the petitioner or an examiner now or subsequent hereto designated by it, and answer questions which on July 20, 1939 and subsequently on to-wit June 13, 1940, the said Frederick A. Clarke refused to answer, and to answer all questions which may be necessary and proper to the conduct of a proceeding hereinafter mentioned; and in support of such application shows as follows: [2]

Paragraph One: On December 8, 1938, the petitioner issued its complaint against Frederick A. Clarke, an individual, trading as Bonequet Laboratories, stating therein that the petitioner had reason to believe that the respondent in such complaint had been and was still violating the provisions of the Federal Trade Commission Act. On January 3, 1939, the respondent filed his answer to said complaint, and hearings were commenced before John J. Keenan, a trial examiner of the petitioner designated by it to prosecute the inquiry under the aforesaid complaint.

Paragraph Two: On May 25, 1939, the petitioner issued and caused to be served by registered mail on June 2, 1939 upon the said Frederick A. Clarke a subpoena requiring his presence at 9:00 A. M., P. S. T., July 20, 1939, before the said John J. Keenan in Room 229, Post Office Building, Los Angeles, California, to testify at the instance of the petitioner in the aforesaid proceeding instituted by the petitioner against Frederick A. Clarke, an individual, trading as Bonequet Laboratories.

Paragraph Three: At the time and place fixed in said subpoena the said Frederick A. Clarke appeared and was sworn as a witness, but refused to answer any and all questions propounded to him by counsel for your petitioner, which questions were designed and intended to bring out certain facts within the particular [3] knowledge of the said Frederick A. Clarke. The propounding of such questions and the refusal of said Frederick A. Clarke

to answer the same appears in the transcript of the hearing of the aforesaid proceeding of that date.

Paragraph Four: Subsequently, William C. Reeves was designated and appointed by the petitioner to take testimony and receive evidence in this proceeding in the place and stead of said John J. Keenan. Subsequently, on to-wit June 5, 1940, the petitioner issued and caused to be served by registered mail on June 10, 1940 upon the said Frederick A. Clarke a subpoena requiring his presence at 10:00 A. M., P. S. T., June 13, 1940, before the said William C. Reeves in Room 216, Chamber of Commerce Building, Los Angeles, California, to testify at the instance of the petitioner in the aforesaid proceeding instituted by the petitioner against Frederick A. Clarke, an individual, trading as Bonquet Laboratories.

Paragraph Five: At the time and place fixed in said subpoena the said Frederick A. Clarke appeared and was sworn as a witness, but refused to answer any and all questions propounded to him by counsel for your petitioner, which questions were designed and intended to bring out certain facts within the particular knowledge of the said Frederick A. Clarke. The propounding of such questions and the refusal of said Frederick A. Clarke to answer the same appears in the transcript of the hearing of the aforesaid proceeding of that date. [4]

Paragraph Six: Subsequently counsel for your petitioner appeared before this Honorable Court to invoke its aid in requiring the testimony of said

Frederick A. Clarke, and an order was entered by this Honorable Court in Case No. Misc. F-2-J In Equity requiring the said Frederick A. Clarke to appear and testify before the duly appointed trial examiner of the Federal Trade Commission, William C. Reeves, at a certain time and place fixed in said order. Your petitioner further shows, however, that the United States Marshal was unable to serve a copy of said order upon the said Frederick A. Clarke, and that service was not at any time had thereon.

Paragraph Seven: Section 9 of the aforesaid Federal Trade Commission Act provides as follows:

“Sec. 9. That for the purposes of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

“Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States,

at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. [5]

“Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. * * *”

Wherefore, the petitioner invokes the aid of this Honorable Court in requiring the attendance and testimony of the said Frederick A. Clarke in the aforementioned proceeding, and prays this Honorable Court to issue an order requiring the said Frederick A. Clark

- 1) To appear before the petitioner on or before the examiner already designated by it or before any other examiner designated by it, at a time and place fixed by the petitioner within the jurisdiction of this Honorable Court;

- 2) To give evidence and testimony touching the matters brought in question by the complaint of the

petitioner hereinbefore mentioned and the answer thereto;

3) To answer all the questions which on July 20, 1939 and on June 13, 1940 he refused to answer; [6]

4 To answer all other questions relevant and material in the said proceeding;

And for such other and further relief as may be just and proper in the premises.

Respectfully,

MERLE P. LYON,

Trial Attorney,

Federal Trade Commission.

Dated: April 18, 1941. [7]

[Title of District Court and Cause.]

District of Columbia—ss.

Merle P. Lyon, of full age, being duly sworn according to law, upon his oath deposes and says that he is an attorney of the Federal Trade Commission, the petitioner herein; that he has read the foregoing application, and that the statements herein contained are true; that he has been authorized by the Federal Trade Commission to execute this verification.

(Sgd) MERLE P. LYON

Sworn and subscribed to before me this 18th day of April, 1941.

[Seal]

EDNA B. VINCEL

Notary Public, District of Columbia.

My Commission expires: May 14, 1944.

[Endorsed]: Filed May 22, 1941. [8]

[Title of District Court and Cause.]

ORDER COMPELLING OBEDIENCE TO
SUBPOENA.

The Federal Trade Commission, having invoked the aid of this Court in requiring the attendance of Frederick A. Clarke as a witness in the proceeding instituted by the Federal Trade Commission against Frederick A. Clarke, an individual trading as Boncquet Laboratories, and in requiring the testimony of the said Frederick A. Clarke; and

The Court having considered said application, it is hereby

Ordered that the said application be, and the same is, hereby granted, and that the said Frederick A. Clarke be, and he is, hereby ordered to appear at 10 A. M., P. S. T., June 16, 1941, at Room 255, Post Office Building, City of Los Angeles, State of California, before Edward E. Reardon, an examiner of the Federal Trade Commission heretofore designated by the said Commission to prosecute the inquiry arising from the issuance by the said Commission of a complaint against Frederick A. Clarke, an individual trading as Boncquet Laboratories, or before any other examiner designated by the said Commission to prosecute the said inquiry; to give evidence and testimony of the aforesaid time and place touching matters brought in question by the complaint [10] of the Federal Trade Commission against Frederick A. Clarke, an individual trading as Boncquet Laboratories, and the answer thereto; to answer at said time and place all the questions

which on July 20, 1939 and on June 13, 1940, the said Frederick A. Clarke at hearings before John J. Keenan and William C. Reeves, examiners of the Federal Trade Commission, refused to answer; to answer at said time and place every other question relevant and material in said proceeding propounded to him by counsel for the Federal Trade Commission; and to attend before the examiner of the Federal Trade Commission from day to day until his examination shall have been completed.

It Is Hereby Further Ordered that service of this order may be made upon the said Frederick A. Clarke by leaving a true copy hereof at his place of business located at 1416-18 South Central Avenue, Glendale, California.

(Sgd) PAUL J. McCORMICK

United States District Judge

Dated: May 23, 1941.

10:05 A. M.

[Endorsed]: Filed May 23, 1941. [11]

[Title of District Court and Cause.]

MOTION FOR ORDER RECALLING, ANNUL-
LING, AND VACATING ORDER COMPEL-
LING OBEDIENCE TO SUBPOENA.

To the Honorable District Court of the United States for the Southern District of California, Central Division, and to the Honorable Ben Harrison, Judge Thereof:

Frederic A. Clarke, sued herein as Frederick A. Clark, hereby moves the Honorable Court above-named for its Order Recalling, Annulling, and Vacating that certain Order Compelling Obedience to Subpoena, signed herein on May 23rd, 1941, by Honorable Paul J. McCormick, a Judge of the above-named Honorable Court.

This Motion is based upon the Notice of Hearing of Motion for Order Recalling, Annulling, and Vacating Order Compelling Obedience to Subpoena, the Order Shortening Time, Memorandum of Points and Authorities, and Affidavit of Frederic A. Clarke in support of Motion for Order Recalling, Annulling and Vacating Order Compelling Obedience to Subpoena, all of which are attached hereto; the Codes, Laws, and Statutes of the United States of America, and of the State of California, and the records and files of the court in this cause.

Dated this 1st day of July, 1941.

ELDON V. SOPER

Attorney for Frederic A.
Clarke, sued herein as
Frederick A. Clark. [12]

[Title of District Court and Cause.]

NOTICE OF HEARING OF MOTION FOR
ORDER RECALLING, ANNULLING, AND
VACATING ORDER COMPELLING OBEDI-
ENCE TO SUBPOENA.

To the Petitioner, Federal Trade Commission, and
to Merle Lyon, Esq., Its Attorney:

Please take notice that on Monday, the 7th day
of July, 1941, at the hour of 10:00 o'clock A. M.,
P. S. T., of said day, or as soon thereafter as coun-
sel can be heard, in the court room of Honorable
Ben Harrison, a Judge of the District Court of the
United States in and for the Southern District of
California, Central Division, located in court room
No. 6 on the second floor of the United States Post
Office and Court House Building, otherwise known
as the Federal Building, located at Main and Temple
Streets, in the City of Los Angeles, County of Los
Angeles, State of California, the within and forego-
ing Motion for Order Recalling, Annulling, and Va-
cating Order Compelling Obedience to Subpoena
will be heard, argued and submitted.

Dated this 1st day of July, 1941.

ELDON V. SOPER

Attorney for Frederic A.
Clarke, sued herein as
Frederick A. Clark. [13]

[Title of District Court and Cause.]

ORDER SHORTENING TIME

Upon the Application of Eldon V. Soper, attorney for Frederic A. Clarke, sued herein as Frederick A. Clark, and good cause appearing therefor:

It Is Hereby Ordered that time of service of the within and foregoing Motion for Order Recalling, Annulling and Vacating Order Compelling Obedience to Subpoena, and of the Notice of Hearing of Motion for Order Recalling, Annulling and Vacating Order Compelling Obedience to Subpoena herein, is so shortened that service thereof in the manner hereinafter provided, is herein adjudged to be sufficient notice of the proceedings mentioned therein.

It Is Further Ordered that service of the foregoing Motion, the Notice of Hearing of Motion for Order Recalling, Annulling, and Vacating Order Compelling Obedience to Subpoena herein, and the papers referred to therein, including this Order Shortening Time, may be made by depositing the same in the United States Post Office at Los Angeles, California, on July 1, 1941, at or before the hour of 4:00 o'clock P. M. of said day, in an envelope addressed as follows, to-wit:

“Merle P. Lyon, Esquire,

Trial Attorney,

Federal Trade Commission,

Washington, D. C.” [14]

and that said envelope shall be marked Air Mail and the postage thereon shall be fully prepaid at the time of depositing, as aforesaid;

It Is Further Ordered that a copy of said papers shall be left for said Merle P. Lyon, Esquire, in care of the Clerk of this Court, on July 1, 1941, at or before the hour of 4:00 o'clock P. M. of said day.

Dated the 1st day of July, 1941.

BEN HARRISON,

Judge of the United States District Court. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF FREDERIC A. CLARKE IN
SUPPORT OF MOTION FOR ORDER RE-
CALLING, ANNULING, AND VACATING
ORDER COMPELLING OBEDIENCE TO
SUBPOENA.

In the United States of America,
Southern District of California—ss.

Central Division, State of California,
County of Los Angeles—ss.

Frederic A. Clarke, being first duly sworn, deposes and says:

That your affiant is the same person who is sued herein as Frederick A. Clark;

That your affiant has read the Application for Order Requiring the Giving of Evidence in the within and above-entitled proceeding;

That it is true as set forth in said Application that your affiant appeared on July 20, 1939 before John J. Keenan, an Examiner for the Petitioner herein, and that your affiant was then sworn as a witness; that it is not true as set forth in said Application that your affiant then "refused to answer any and all questions propounded to him by counsel" for the Petitioner; that your affiant did then refuse to answer certain questions propounded to him by counsel for the petitioner, and that your affiant did so upon the advice of his attorney; that said attorney informed your affiant, and your affiant believes and so states that the questions then propounded to your affiant as aforesaid, and which your affiant then [16] refused to answer were and are incompetent, irrelevant, and immaterial.

That it is true that as set forth in said Application that on June 13, 1940, your affiant appeared before William C. Reeves, an Examiner for the Petitioner herein, and that your affiant was then sworn as a witness; that it is not true as set forth in said Application that your affiant then "refused to answer any and all questions propounded to him by counsel", for the Petitioner; that your affiant did then refuse to answer certain questions propounded to him by counsel for the Petitioner, and that your affiant did so upon advice of his attorney; that said attorney informed your affiant, and your affiant believed and so states, that *he* questions then propounded to your affiant, as aforesaid, and which

your affiant then refused to answer, were and are incompetent, irrelevant and immaterial.

That your affiant has no information or belief sufficient to enable him to answer the allegation contained in said Application; that an Order was thereafter entered in this Honorable Court requiring your affiant to appear "at a certain time and place fixed in said Order"; that to the best of the knowledge, information and belief of your affiant, no attempt was made to serve your affiant with said Order.

That your affiant is, and at all times since April 1, 1937 has been, doing business in the City of Glendale, County of Los Angeles, State of California, under the firm name and style of Bonquet Laboratories; that it is true that your affiant was outside of the State of California from about March 15, 1939 to about June 20, 1939, and that your affiant was also outside of the State of California for shorter periods of time on other occasions; that your affiant has never refused to obey any Subpoena issued by the Federal Trade Commission, or by the above-named Honorable Court, or by any other court. That your affiant is not in contempt of the Federal Trade [17] Commission.

That your affiant has examined the records and files of the above-named Honorable Court in this proceeding, including the docket, and that it does not appear therefrom that any transcript of the hearings of the above-mentioned proceedings has been filed herein; that it does not appear from the

foregoing Application what questions were propounded to your affiant on the occasions mentioned therein, nor what questions your affiant then refused to answer; nor does said Application contain any showing as to the issues in the controversy between the Federal Trade Commission and your affiant.

The hearing mentioned in the Order Compelling Obedience to Subpoena on file herein was continued to July 7, 1941, at 10:00 o'clock A. M., P. S. T., by order of Edward E. Reardon, a Examiner of the Federal Trade Commission; that the foregoing Application was presented ex-parte on or about May 23, 1941 to Honorable Paul J. McCormick, Judge of the above named Honorable Court; that neither your affiant or his attorneys were given any Notice of said Application, nor any opportunity to be present thereat, or to be heard thereon; that said Order to Compel Obedience to Subpoena was issued without any Notice thereof being given to your affiant or to his attorneys.

That your affiant is informed by his attorney, and believes and so states, that unless the Order Compelling Obedience to Subpoena is Recalled, Annulled, and Vacated in accordance with the accompanying Motion, that your affiant will be compelled to answer any and all questions which may be propounded to him by counsel for the Federal Trade Commission on July 7, 1941, at the hour of 10:00 A. M., P. S. T., or thereafter, whether said questions are competent, relevant, immaterial, and whether or not said questions touch or pertain to

the issues in the controversy between the Federal Trade Commission and your affiant, and that if your affiant then [18] refuses to answer said questions, or any thereof, that a proceeding will be commenced to punish your affiant for contempt.

Wherefore, your affiant prays that this Honorable Court make its Order Recalling, Annulling, and Vacating the Order Compelling Obedience to Subpoena, dated May 23, 1941, and signed by Honorable Paul J. McCormick, Judge of the District Court of the United States in and for the Southern District of California, Central Division.

FREDERIC A. CLARKE

Subscribed and sworn to before me this 1st day of July, 1941.

[Seal]

LEETA MANNING,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jul. 1, 1941. [19]

[Title of Cause.]

AFFIDAVIT

United States of America,
Southern District of California,
Los Angeles County—ss.

Merle P. Lyon, being duly sworn, deposes and says:

1. I am a special assistant to William T. Kelley, Chief Counsel for the Federal Trade Commis-

sion, Petitioner in the above-entitled cause, and I am trial attorney for said Federal Trade Commission in the case now pending before the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, Docket No. 3660.

2. On December 8, 1938, the Petitioner issued its complaint against the defendant, stating therein that the petitioner had reason to believe that the respondent in said complaint had been and was still violating the provisions of the Federal Trade Commission Act. On January 3, 1939, the said respondent, Frederick A. Clarke, filed his answer to said complaint, and hearings were commenced before a trial examiner of the petitioner duly designated by it to prosecute the inquiry under the aforesaid complaint.

3. Subsequently, on to-wit, July 20, 1939 and on June 13, 1940, the said respondent Frederick A. Clarke, having been duly subpoenaed as a witness in said pending proceeding, refused to answer any and all questions propounded to him by counsel for your petitioner, which said questions were designed and intended to bring out certain facts within [20] the particular knowledge of the said respondent.

4. Subsequently, on to-wit May 23, 1941, and pursuant to the prayer of a petition filed by your petitioner in the above-entitled cause, an order was duly entered herein directing that the said Frederick A. Clarke, defendant herein, appear at 10 A. M. P. S. T. June 16, 1941, at Room 255, Post

Office Building, City of Los Angeles, State of California, before Edward E. Reardon, an examiner of the Federal Trade Commission heretofore designated by the said Commission to prosecute the inquiry arising from the issuance by the said Commission of a complaint against the said Frederick A. Clarke, an individual trading as Bonequet Laboratories, and give evidence and testimony at said time and place touching matters brought in question by the complaint of the Federal Trade Commission against the said Frederick A. Clarke and his answer thereto, and to answer at said time and place all the questions which on July 20, 1939 and June 13, 1940 the said Frederick A. Clarke at hearings before John J. Keenan and William C. Reeves, examiners of the Federal Trade Commission, refused to answer; and to answer at said time and place every other question relevant and material in said proceeding propounded to him by counsel for the Federal Trade Commission; and to attend before the examiner of the Federal Trade Commission from day to day until his examination shall be completed.

5. All of which will more fully appear from a copy of such order hereto annexed and marked "Exhibit A."

6. A copy of such order was personally served upon the said Frederick A. Clarke, on the 4th day of June, 1941, as more fully appears from the affidavit of service attached to said Exhibit A.

7. Said defendant, Frederick A. Clarke, did not appear at the time [21] and place designated in

said order, but an attorney purporting to represent said defendant appeared and presented to the trial examiner of the Federal Trade Commission a physician's certificate to the effect that said defendant was ill and under the care of a physician, and that he would be unable to attend such hearing without danger to his health. Thereupon the hearing before the trial examiner of the Federal Trade Commission was necessarily continued until July 7, 1941, at 10 A. M.

8. Subsequently, a petition was filed by the said Frederick A. Clarke in this cause seeking to vacate and set aside the order entered herein on May 23, 1941 compelling the said Frederick A. Clarke to obey the subpoena of the Federal Trade Commission to appear and testify in Docket No. 3660 in the pending matter before the Federal Trade Commission in which the said Frederick A. Clarke was respondent. Said petition was duly heard by this Court on July 7, 1941, and after such hearing was duly denied.

9. Thereafter, on to-wit, July 7, 1941, the said Frederick A. Clarke appeared before Edward E. Reardon, Trial Examiner of the Federal Trade Commission, and gave certain testimony relative to the issues in the certain matter pending before the Federal Trade Commission docketed at Docket 3660, entitled Federal Trade Commission v. Frederick A. Clarke, trading as Bonquet Laboratories. Said Frederick A. Clarke, however, refused to answer certain relevant and proper questions propounded

to him by counsel for the Federal Trade Commission pertaining to the formula, composition, and ingredients of his product known as Bonequet Blood Building Tablets or Bonequet Tablets, the answers to said questions being peculiarly and exclusively within the personal knowledge of said Frederick A. Clarke. Said Frederick A. Clarke was thereupon ordered and directed by said Edward E. Reardon, [22] trial examiner of the Federal Trade Commission, to answer said questions, but he thereupon refused to do so, or to give further evidence deemed by said trial examiner to be pertinent and admissible in said proceeding. Said Frederick A. Clarke based his refusal to testify as thus directed upon the excuse and pretext that such testimony would require him to divulge trade secrets and would irreparably injure him in his business and occupation.

10. The complaint now pending before the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Docket 3660, charges said respondent with false and misleading advertising and unfair and deceptive acts and practices in connection with the sale and distribution of his product "Bonequet Tablets", and said proceeding was instituted by your petitioner in the public interest for the protection of the public against false and misleading therapeutic claims made by respondent for said product. In order to properly dispose of the issues now pending before it, it is necessary and imperative for the Federal Trade Commission to have full and

complete information concerning the formula of respondent's product, and respondent's refusal to testify with reference thereto will of necessity hamper and handicap the efforts of the said Commission to properly decide the issues now pending before it in said cause.

11. All of the testimony and other evidence heretofore adduced in the pending proceedings before the Federal Trade Commission in the Matter of Frederick A. Clarke, trading as Boncquet Laboratories, has been reduced to writing, and is ready to be produced before this Honorable Court by this affiant at any hearing which may be ordered held herein to determine the merits of the motion to show cause now [23] pending herein.

Dated July 8, 1941.

MERLE P. LYON,

Trial Attorney, Federal Trade Commission.

Sworn to before me this 8th day of July, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk of the District Court
for the Southern District of
California.

By J. M. HORN,

Deputy Clerk.

[Endorsed]: Filed Jul. 8, 1941. [24]

[Title of District Court and Cause.]

DEMURRER

Comes now the Respondent, Frederic A. Clarke, sued and cited herein as Frederick A. Clarke, and demurs to the Affidavit for Order to Show Cause in re Contempt, executed by Merle P. Lyon under date of July 8, 1941, on file herein, on the following, and each of the following grounds, to-wit:

I.

That said Affidavit does not state facts sufficient to constitute a cause of contempt against the Respondent.

II.

That said Affidavit is insufficient to confer jurisdiction on the above-entitled court to try or punish the Respondent for contempt.

Wherefore, Respondent prays that this demurrer be sustained and that the contempt proceeding initiated by said Affidavit and Order to Show Cause herein, be dismissed.

ELDON V. SOPER,

Attorney for Respondent, Frederic A. Clarke.

[Endorsed]: Filed Jul. 14, 1941. [25]

[Title of Cause.]

MOTION FOR ORDER TO SHOW CAUSE.

To the Honorable Judges of the District Court of
the United States for the Southern District of
California:

Now comes the Federal Trade Commission, petitioner in the above-entitled cause, and moves the Court for an order against the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of this court upon the grounds set forth in the affidavit of Merle P. Lyon, special assistant to the Chief Counsel of the Federal Trade Commission, verified the 14th day of July, A. D., 1941, which is hereto attached and made a part hereof.

Dated July 14, 1941.

MERLE P. LYON,

Attorney for the Federal Trade Commission. [26]

[Title of Cause.]

AFFIDAVIT

United States of America,
Southern District of California,
Los Angeles County—ss.

Merle P. Lyon, being duly sworn, deposes and says:

1. I am a special assistant to William T. Kelley, Chief Counsel for the Federal Trade Commission,

Petitioner in the above-entitled cause, and I am the trial attorney for said Federal Trade Commission in the case now pending before the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, Docket No. 3660.

2. On December 8, 1938, the Petitioner issued its complaint against the defendant, stating therein that the petitioner had reason to believe that the respondent in said complaint had been and was still violating the provisions of the Federal Trade Commission Act. A copy of said complaint is attached hereto marked "Exhibit A" and hereby made a part hereof. On January 3, 1939, the said respondent, Frederick A. Clarke, filed his answer to said complaint, a copy of which answer is hereto attached Marked "Exhibit B" and hereby made a part hereof. Hearings were commenced before a trial examiner of the petitioner duly designated by it to prosecute the inquiry under the aforesaid complaint.

3. Subsequently, on to-wit, July 20, 1939 and on June 13, 1940 respectively, the said respondent Frederick A. Clarke, having been duly subpoenaed as a witness in said pending proceeding, refused to answer any and all questions propounded to him by counsel for your petitioner, which said questions were designed and intended to bring [27] out certain facts within the particular knowledge of the said respondent.

At the hearing on July 20, 1939 held in Los An-

geles, California, respondent was asked by Dewitt T. Puckett, counsel for the Federal Trade Commission, the following question:

Q. Mr. Clarke, what is your address?

The following then occurred as shown by the official transcript in Docket 3660 in the Matter of Frederick A. Clarke, trading as Bonequet Laboratories:

“Mr. Castruccio: Now, just a moment. Mr. Clarke, we instruct you to decline to answer, on the grounds we have already stated, as your counsel. We respectfully submit to this Commissioner that the complaint does not state facts sufficient to constitute a cause of action, and that the Commission has not any jurisdiction, and for the further reason that it is a violation of your constitutional rights requiring you to testify in a manner that might tend to incriminate you; and for those reasons we instruct you to decline to answer the question. Now, you can just state to Mr. Puckett that you decline to answer on the advice of counsel.

The Witness: I decline to answer on the advice of counsel.

By Mr. Puckett: Q. Do you decline to answer any questions I propound to you?

A. That is right.” (Docket 3660 FTC. pp. 9, 10)

Subsequently, on to-wit, July 22, 1939 at a hearing held in Los Angeles, California, Mr. Frederick A. Clarke again refused to answer any and all

questions put to him by counsel for the Commission. At page 196 of the official record he was asked the following question:

“Q. Now, Mr. Clarke, I hand you Commission’s Exhibit 9 for identification, which is a small pamphlet, or leaflet, the front cover of which contains this statement, ‘New, fighting blood in nine days,’ and ask you to state whether or not that is some of the advertising you have used?

Mr. Castruccio: Just a moment, Mr. Clarke. We instruct the respondent to decline to answer on the advice of counsel, for the reasons heretofore given.

The Witness: I decline to answer on the advice of counsel for the reason heretofore given.” (FTC Docket 3660, pp. 196, 197)

Subsequently, on to-wit, June 13, 1940, at a hearing held in Los Angeles, California, the following questions and answers appear at Page 280 of the official record in Docket 3660:

“Q. Under what name are you doing business? [28]

Mr. Castruccio: Just a moment, Mr. Clarke. We instruct you to decline to answer any further questions on the ground that the respondent objects to the jurisdiction of the Commission as heretofore shown on the record and for that reason all these questions are incompetent, irrelevant and immaterial until the ques-

tion of jurisdiction has been determined, and therefore, you are instructed on the advice of counsel to decline to answer any further questions.

Trial Examiner Reeves: The witness is directed to answer the question.

The Witness: I refuse to answer on the advice of counsel.

Q. Then, you refuse to answer any questions with reference to the complaint in this matter, Mr. Clarke?

A. I do, on the advice of counsel."

4. Subsequently, on, to-wit May 23, 1941, and pursuant to the prayer of a petition filed by your petitioner in the above-entitled cause, an order was duly entered herein directing that the said Frederick A. Clarke, defendant herein, appear at 10 A. M., P. S. T. June 16, 1941, at Room 255, Post Office Building, Los Angeles, California, before Edward E. Reardon, an examiner of the Federal Trade Commission heretofore designated by the said Commission to prosecute the inquiry arising from the issuance by the said Commission of a complaint against the said Frederick A. Clarke, an individual, trading as Boncquet Laboratories, and give evidence and testimony at said time and place touching matters brought in question by the complaint of the Federal Trade Commission against the said Frederick A. Clarke and his answer thereto, and to answer at said time and place all the questions

which on July 20, 1939 and June 13, 1940 the said Frederick A. Clarke at hearings before John J. Keenan and William C. Reeves, examiners of the Federal Trade Commission, refused to answer; and to answer at said time and place every other question relevant and material in said proceeding propounded to him by counsel for the Federal Trade Commission; and to attend before the examiner of the Federal Trade Commission from day to day until his examination shall be completed. Copy of said order was personally served upon the said Frederick A. Clarke on the 4th day of June, 1941, as will [29] appear from copy of said order attached hereto as Exhibit C and made a part hereof.

5. Said defendant, Frederick A. Clarke, did not appear at the time and place designated in said order, but an attorney representing said defendant appeared and presented to the trial examiner of the Federal Trade Commission a physician's certificate to the effect that said defendant was ill and under the care of a physician, and that he would be unable to attend such hearing without danger to his health. Thereupon, the hearing before the trial examiner of the Federal Trade Commission was necessarily continued until July 7, 1941 at 10 A. M.

8. Subsequently, a petition was filed by the said Frederick A. Clarke in this cause seeking to vacate and set aside the order entered herein on May 23, 1941 compelling the said Frederick A. Clarke to obey the subpoena of the Federal Trade Commission to appear and testify in Docket No. 3660 in the

pending matter before the Federal Trade Commission in which the said Frederick A. Clarke was respondent. Said petition was duly heard by this Court on July 7, 1941 and was duly denied.

9. Thereafter, on to-wit July 7, 1941, the said Frederick A. Clarke appeared before Edward E. Reardon, Trial Examiner of the Federal Trade Commission, and gave certain testimony relative to the issues in the certain matter pending before the Federal Trade Commission docketed as No. 3660, entitled Federal Trade Commission v. Frederick A. Clarke, trading as Boncquet Laboratories. Said Frederick A. Clarke, however, refused to answer certain relevant and proper questions propounded to him by counsel for the Federal Trade Commission pertaining to the formula, composition and *ingredients* of his product known as Boncquet Tablets or Boncquet Blood Building Tablets, the answers to said questions being peculiarly and exclusively within the personal knowledge of said Frederick A. Clarke. The questions and answers material in this connection appear at p. 330 et seq. of the official transcript of the record in Docket 3660 as follows:

[30]

“Trial Examiner Reardon: Well, the question is, Mr. Clarke, what is the formula of that product that you produced and sold since some time in 1937, which you gave the date for.

The Witness: Well, one——

Trial Examiner Reardon: There is an objection to that, is there?

Mr. Soper: Yes, there is an objection.

Mr. Lyon: What is the ruling on it?

Trial Examiner Reardon: What would be the grounds for the objection, if you would like to state them on the record?

Mr. Soper: Yes. The objection is this: That, as I understand the only claim made by the Commission is that the product manufactured by Mr. Clarke may not contain the liver, liver extract, and he exhibited to me a couple of analyses made for the Commission by Government officials, and while the examinations indicated that there was—at least one of those examinations indicated that there was liver present, they were unable to ascertain what the liver content was. Now, if the only question is as to the liver content, as to whether or not it contains liver, it seems to me that the question could be answered categorically.

Trial Examiner Reardon: Well, the question at the present time is what the stenographer will read, and I will overrule the objection, and that will settle the question about the liver and whether it is there or not.

Mr. Soper: Of course, it does that, but it also compels him to disclose the formula.

Trial Examiner Reardon: I can only go according to the question and rule on the question. Will you read the question?

(The question was read).

The Witness: Well, it consists of, one, Raw liver principle extracted——

Trial Examiner Reardon: Does it state the quantity?

The Witness: No, it doesn't. In parenthesis, "(Red blood cell maturing factor.)"

By Mr. Lyon:

Q. What was that last part again?

A. "(Red blood cell maturing factor)."

Q. Maturing?

A. Yes. That is a description of the raw liver principle extract.

2. Dehydrated vegetable parsley concentrate.

Q. Parsley?

A. Parsley, p-a-r-s-l-e-y, concentrate.

3. Pure dried brewers' grain yeast.

4. Vitamin B-1.

5. Riboflavin, and then in parenthesis, (Vitamin G or B-2)

6. Pure dehydrated milk whey.

7. Dextrose, as a binder.

Trial Examiner Reardon: Those are all the ingredients? [31]

The Witness: That is right.

Trial Examiner Reardon: But that does not state the formula. The formula calls for the quantities.

By Mr. Lyon:

Q. Yes. What are the proportions of those different ingredients?

A. Of course, that is my trade secret.

Trial Examiner Reardon: Do you object?

Mr. Soper: Yes, I do.

Trial Examiner Reardon: I will have to overrule the objection and direct the witness to answer.

The Witness: Well, I would be divulging all my trade secrets.

Trial Examiner Reardon: I know that, but I can't help that. I have to direct you to answer. You are selling the product, and we are entitled to know.

The Witness: Well, I decline to answer, to divulge this trade secret.

Mr. Soper: As I understand it, Mr. Clarke, you are not unwilling to let the Commission know that you actually use liver?

The Witness: Oh, no. No, I can show you bills for thousands of dollars from the Swift Company, showing that I used liver, and I am not buying liver just to go out and throw it away and just to tell the Federal Trade Commission.

Trial Examiner Reardon: That isn't the point. The point is that the question calls for the formula, and you have only named the ingredients, without naming the amounts, proportionate amounts, that are used in constructing the product, and the question has not been answered.

Now, the only thing I can ask you is: Do you decline to answer on the ground that your answer would tend to incriminate or degrade you?

The Witness: Well, it wouldn't tend to incriminate or degrade me. It would deprive me of my constitutional property, my constitutional rights.—

Mr. Lyon: If the Examiner please, the witness on the stand is charged with false and misleading advertising, and in view of the public interests involved in this case, I believe that he should be required to give the proportions and percentages of these various ingredients, and the manner in which they are used. I therefore insist upon an answer to the previous question.

Trial Examiner Reardon: I directed the witness to answer, and I understand on the advice of counsel—Mr. Soper, is that right—he had declined to answer.

Mr. Soper: Well, I think the record shows that the witness has declined to answer.

Trial Examiner Reardon: But you haven't advised him to decline to answer, have you? It is not on your advice, is it? [32]

Mr. Soper: Well, I think when you ask that question you place an attorney in an impossible position. Under the attorney's oath, it is his duty to protect his client at all costs,

and when you ask me that question, I have to sit here——

Trial Examiner Reardon: Yes, I will not ask you to answer it. The client has refused to answer it. Then there is nothing further to be done except to know whether you are going to take any steps by way of court procedure, Mr. Lyon, to obtain an answer to the question.

Mr. Lyon: Yes, I intend to take such proceedings, and for that reason I should like to have a short continuance of this particular case. (Whereupon the hearing was adjourned until July 18, 1941 at 10 A. M.)”

10. As is more particularly shown by the excerpts from the official record heretofore set out, the said Frederick A. Clarke has been ordered by Edward E. Reardon, trial examiner for the Federal Trade Commission in Docket 3660, to answer all relevant and pertinent questions concerning the formula for his product Bonquet Tablets, but he has refused to do so, basing his said refusal upon the excuse and pretext that such testimony would require him to divulge trade secrets and would irreparably injure him in his business and occupation. The complaint in Federal Trade Commission Docket 3660 was filed by the Federal Trade Commission in the public interest, and for the protection of the public against false and misleading advertising disseminated by this defendant. In order to properly dispose of the issues now pending be-

fore it, it is essential for the Federal Trade Commission to have full and complete information concerning the formula of defendant's product, and his refusal to testify with reference thereto in a matter involving the paramount interest of the general public, if sustained by this Court, will defeat the ends of justice and make it impossible for the Federal Trade Commission to function in the prevention of unfair and deceptive acts and practices in commerce in connection with the sale and distribution of medicinal and patent preparations where a so-called secret formula is involved.

Dated July 14, 1941.

MERLE P. LYON,

Trial Attorney, Federal Trade
Commission.

Sworn to before me this 14th day of July, 1941.

(Seal)

R. S. ZIMMERMAN,

Clerk U. S. District Court
Southern District of Cali-
fornia.

By J. M. HORN,

Deputy. [33]

“EXHIBIT A”

United States of America
Before the Federal Trade Commission

Docket No. 3660

In the Matter of Frederick A. Clarke, an individual,
trading as Boncquet Laboratories.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Frederick A. Clarke, an individual, trading as Boncquet Laboratories, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent, Frederick A. Clarke, is an individual, trading and doing business under the name of Boncquet Laboratories, with his office and principal place of business located at 1416-18 South Central Avenue, Glendale, California. Respondent is now and for more than one year last past has been engaged in the business of selling and distributing a drug variously designated as “Boncquet Blood Building Tablets,” “Boncquet Hemo-Tabs” or “Boncquet Tablets.”

In the course and conduct of his said business,

respondent causes said preparation when sold to be transported from his place of business in the State of California to wholesale and retail druggists and other purchasers thereof located in various states of the United States other than the State of California, and in the District of Columbia.

Paragraph Two: In the course and conduct of his business respondent, now maintains and at all times mentioned herein has maintained a course of trade in said preparation in commerce between and among the various states of the United States and in the District of Columbia.

Paragraph Three: In the course and conduct of his aforesaid business the respondent has disseminated, and has caused the dissemination of, false advertisements for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of respondent's said preparation. Said false advertisements were and are disseminated by use of the United States mails, by insertion in newspapers, and periodicals having a general circulation, and also in circulars and other printed matter, all of which are distributed in commerce among and between the various states of the United States and in the District of Columbia. Various other means have been and are used by respondent to disseminate or cause the dissemination of said false advertisements for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase in commerce among and between the various states of the United States and in the

District of Columbia of respondent's said preparation. Among and typical of the statements and representations contained in said false advertisements so used and disseminated, as aforesaid, are the following: [34]

“New Fighting Blood in 9 Days”

“Blood Poverty Can Now Be Overcome With Boncquet Tablets. In nine days, one-third of your blood is regenerated—in little more than a week's time, you will begin to feel the results of “Boncquet Tablets”—you will ‘feel better’, more ‘alive’, more able to face the day's demands, less fatigued at night. In 30 days the blood will be entirely rebuilt and by taking Boncquet Blood Building Tablets this new blood will be rich in the fighting qualities that help defeat disease.”

“What are Boncquet (Bon Kay) Tablets? They constitute a food, not a drug. Comparatively recent scientific discoveries prove that the best blood builder is composed of these ingredients: Active Principle of Raw Liver, Vegetable Iron, Vitamins B and G, Boncquet Blood Building Tablets are guaranteed to contain the above ingredients in effective therepeutic amounts. Boncquet Tablets are scientifically processed to retain maximum Vitamins A, B, E, and G and essential minerals in their true organic colloidal form, easily assimilated and are strongly alkaline. They are rich in organic mineral salts, digestive enzymes, oxidizers, glandular hormones, vegetable and animal hemopocitins (blood

makers). They also contain a rich supply of milk minerals giving to the body calcium and phosphorus in their true and natural proportions as found in milk. Bonsquet Tablets are the discovery of Dr. Pierre Auguste Boncquet, internationally noted biochemist."

"Boncquet Tablets increase the number and color of your blood corpuscles. Boncquet Tablets increase the blood's energizing power, and its capacity to burn toxic poisons in the system. Your body rebuilds one-third of your blood every nine days, but if your diet lacks the essential ingredients such as are combined in Boncquet Tablets the same thin, inefficient, weak, anemic blood will be rebuilt. That is why it takes Boncquet Tablets but a short time—hardly more than a week—to improve your condition. As you continue you add new rich fighting blood. Toxic poisons are destroyed, the balance and chemical content of your system is improved, and Nature herself battles the ills that have upset you."

"Every Diseased Condition Directly or Indirectly Related to Bloodstream."

"Boncquet Tablets are designed to nourish and stimulate the bone marrow where every red blood cell is manufactured before being thrown into the blood stream. To the best of our knowledge and belief, we do not know of a single failure of Boncquet Tablets to nourish and stimulate the bone marrow, and if this is done, new red blood cells, rich in hemoglobin, are built just as surely as you

can expect power when you turn on the switch of an electric motor."

"It is futile to treat the symptoms of any disease without first calling to your aid the most important organ of your body—your bloodstream. Nine out of ten are deficient in red blood cells and hemoglobin, but they call it by every name but the right one—Secondary Anemia. Bonquet Blood Building Tablets correct this condition."

"Bonquet Tablets supply quickly those elements essential to rebuild to normal, thin, weak, anemic blood. By taking Bonquet Tablets you provide your system with new, rich fighting blood. In less than a month your blood is revitalized, made richer, and in most cases, brought to normal red blood cell count." [35]

"Hemo-Tabs stimulate production of blood and increase its corpuscle-count, improve its color, and enable it to carry more oxygen to your body's tissues. Hemo-Tablets speed up your blood's food-burning or energizing power, enabling your system to destroy toxic poisons that mean, first a let-down, and then serious illness. Hemo-Tabs increase elimination of the by-products of digestion, thus increasing the nutritional value of the food you eat. Hemo-Tabs are prescribed by physicians, and are indicated wherever the blood stream has become unable to fight disease. Available directly from your druggist, Hemo-Tabs represent a distinct advance in man's ability to fight his greatest enemy—disease."

Through the use of the statements and representations hereinabove set forth, and others similar thereto not set out herein, all of which purport to be descriptive of respondent's drug and of its effectiveness in use, respondent represents that his preparation, Boncquet Blood Building Tablets, also known as Boncquet Tablets or Boncquet Hemo Tabs, is not a drug but a food; that this preparation has the power to and will regenerate the blood in 9 to 30 days; that it is a valuable aid and remedy in the treatment and cure of anemia; that this preparation is scientifically processed so as to have and retain Vitamins A, B, E and G in the maximum amounts; that this preparation is rich in organic mineral salts, digestive enzymes, glandular hormones and vegetable and animal blood makers; that this preparation assists in the formation of red blood corpuscles or hemoglobin and beneficially affects the metabolic processes of the body; that it stimulates the bone marrow and destroys toxic poisons; that this preparation is the discovery of Dr. Pierre August Boncquet, an internationally known biochemist; that a large number of bodily ailments and symptoms are due to anemia and can be cured by self-administration of respondent's preparation without the aid of diagnosis by a competent physician.

Paragraph Four: In truth and in fact respondent's preparation is not a food but a drug; it has no significant effect on the blood or the bloodstream and will not regenerate the blood. It contains no in-

gredient which has any value in the treatment of anemia, except liver, which is useful only in the treatment of pernicious anemia, and then only if given in relatively large amounts. This preparation contains Vitamins A, B, E and G in small amounts only. It is no richer in organic mineral salts, digestive enzymes, glandular hormones and vegetable and animal blood makers than any ordinary food. This preparation has no power to increase the number or affect the color of red blood corpuscles or hemoglobin and has no effect on the metabolic processes of the body. It does not increase the energizing power of the blood, nourish or stimulate the bone marrow or destroy toxic poisons. Pierre Auguste Bonquet is not a medical doctor and has no reputation whatsoever as an authority on food and nutrition. He has no connection with respondent's business whatsoever nor did he "discover" respondent's preparation. Anemia can be diagnosed only by a competent physician, and the various symptoms and ailments mentioned in respondent's advertising may or may not be the result of an anemic condition. Bonquet Tablets have no significant value in any anemic condition.

Paragraph Five: The use by respondent of the foregoing false deceptive and misleading advertisements with respect to said drug disseminated as aforesaid has had and now has the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such false advertise-

ments are true, and causes a substantial portion of the purchasing public because of said erroneous and mistaken belief to purchase a substantial amount of respondent's said drug. [36]

Paragraph Six: The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission on this 8th day of December, A.D. 1938, now issues this its complaint, against said respondent.

By the Commission.

OTIS B. JOHNSON,
Secretary. [37]

“EXHIBIT B”

United States of America
Before Federal Trade Commission

Docket No. 3660

In the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories.

ANSWER

Comes now the respondent, Frederick A. Clarke, an individual, trading as Bonequet Laboratories, and for answer to complaint on file herein admits, denies and alleges as follows:

By Way of a Special and Saparate Defense Respondent Alleges:

Paragraph One: That said commission has not the jurisdiction to issue said complaint for the reason that said complaint does not state or make known to respondent how or in what manner the alleged practices of respondent are prejudicial and injurious to the public nor does said complaint state how or in what manner said practices are deceptive nor does it state how or in what manner said practices and acts are unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Said Federal Trade Commission Act was created through and by an act of Congress for the purpose of protecting the public interest in matters of unfair methods of competition in commerce.

Paragraph Two: That said commission in said complaint has failed to state or make known to respondent who are competitors of respondent, or whether, if there are any competitors, if the same are substantial competitors or respondent, nor does said complaint state whether said competitors, if there be any, are engaged in commerce between and among the various states of the United States and in the District of Columbia.

Paragraph Three: Said complaint does not state facts sufficient to establish jurisdiction in said commission to issue said complaint for the reason that there is no statement of any injury to any substantial competitor of respondent or that the alleged unfair and deceptive acts and practices in com-

merce substantially affect and involve the public interest.

Paragraph Four: That said complaint does not state facts sufficient to constitute a cause of action within the jurisdiction of said commission for the reason that said complaint does not give any specific acts of unfair and deceptive acts and practices in commerce, but that said allegations are purely conclusive.

Paragraph Five: That said complaint does not state facts sufficient to constitute a cause of action within the jurisdiction of said commission for the reason that there is no specific or substantial allegation that the issuance of said complaint is for the interest of the public.

Paragraph Six: That there is no specific allegation of a present or potential competitor. [38]

Paragraph Seven: That there is no allegation that the alleged unfair and deceptive acts and practices in commerce injuriously affect or tend to affect the public or any present or potential competitor.

Paragraph Eight: That there is no specific allegation that the alleged unfair and deceptive acts and practices in commerce tend in a substantial manner to suppress competition.

As A Further and Separate Defense Respondent Alleges:

Paragraph One: Respondent denies that said preparation is a drug, and further denies that said advertisements are false, deceptive and misleading and further denies that said advertisements have or tend to mislead or deceive a substantial or any por-

tion of the purchasing public into an erroneous and mistaken belief as to the meaning of such advertisements.

Paragraph Two: Respondent further denies the existence of any substantial competitors engaged in commerce at any of the times stated in said complaint.

Paragraph Three: Respondent further denies any injury or tendency to injure any substantial competitor and further denies that any of the alleged acts or practices set forth in said complaint are injurious and prejudicial to the public or injurious and prejudicial to any substantial competitor within the intent and meaning of said Act of Congress creating said Federal Trade Commission.

Wherefore: Respondent respectfully submits that said commission has exceeded its lawful power in instituting said proceeding and that it will exceed its lawful power in issuing any order against said respondent based upon said complaint, and respondent further prays that said complaint be dismissed on the grounds of lack of jurisdiction of the subject matter in said commission.

FREDERICK A. CLARKE,

An individual, trading as
Bonquet Laboratories,
Respondent,

By C. M. CASTRUCCIO,

His Attorney

315 West Ninth St.

Los Angeles, California.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE.

On the motion of Merle P. Lyon, attorney for the Federal Trade Commission, petitioner herein, and the affidavit of said Merle P. Lyon, verified the 14th day of July, 1941, charging contempt of court against Frederick A. Clarke, defendant herein, it is

Ordered that the said Frederick A. Clarke be and appear before the Court at 10 A. M. on the 18th day of July, 1941, to show cause, if any he has, why he should not be punished for contempt of court in refusing to obey an order of this court entered herein on May 23, 1941, ordering said Frederick A. Clarke to appear and testify before Edward E. Reardon, a trial examiner of the Federal Trade Commission in a certain proceeding pending before the said Federal Trade Commission in the matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories; as more fully appears from the motion and affidavit of Merle P. Lyon, special assistant to the Chief Counsel of the Federal Trade Commission, copies of which are hereby ordered to be served herewith.

Dated July 14, 1941.

BEN HARRISON,

District Judge. [40]

[Endorsed]: Motion, affidavit, and order to show cause for contempt of court. Filed Jul. 14, 1941.

[41]

[Title of District Court and Cause.]

DEMURRER

Comes now the Respondent, Frederic A. Clarke, sued and cited herein as Frederick A. Clarke, and demurs to the Affidavit for Order to Show Cause in re Contempt, executed by Merle P. Lyon under date of July 14, 1941, on file herein; on the following, and each of the following, grounds, to-wit:

I.

That said affidavit does not state facts sufficient to constitute a cause of contempt against the Respondent.

II.

That said Affidavit is insufficient to confer jurisdiction of the above-entitled court to try or punish the Respondent for contempt.

Wherefore, Respondent prays that this demurrer be sustained and that the contempt proceeding initiated by said Affidavit and Order to Show Cause herein, be dismissed.

ELDON V. SOPER,

Attorney for Respondent

Frederic A. Clarke.

[Endorsed]: Filed Jul. 18, 1941. [42]

[Title of District Court and Cause.]

AFFIDAVIT OF FREDERIC A. CLARKE
IN RE CONTEMPT

Now Comes Frederic A. Clarke, sued herein as Frederick A. Clark, and, in answer and response to the Affidavit for Order to Show Cause in re Contempt made in this proceeding by Merle P. Lyon, dated July 14, 1941, and subscribed and sworn to by said Merle P. Lyon on said date, before R. S. Zimmerman, Clerk of the above-named Honorable Court, makes affidavit as follows, to-wit:

United States of America,
Southern District of California,
Central Division—ss.

State of California,
County of Los Angeles—ss.

Frederic A. Clarke, being first duly sworn, deposes and says:

1. That your affiant is the Respondent named in that certain Order to Show Cause issued out of the above-named Honorable Court in this proceeding under date of July 14, 1941, by Honorable Ben Harrison, a Judge of said Court; that your affiant is the same person as Frederick A. Clark who is named in said Order to Show Cause as the Defendant and Respondent herein; [43]

2. That your affiant has read the affidavit made in this proceeding by Merle P. Lyon, dated July 14, 1941, and which was subscribed and sworn to by said

Merle P. Lyon on said last mentioned date before R. S. Zimmerman, Clerk of the above named Honorable Court; That said affidavit does not states facts sufficient to constitute a cause of contempt against your affiant.

3. That in connection with paragraph No. "3". in said affidavit your affiant admits that on July 20, 1939, and on June 13, 1940, your affiant appeared before Examiners for the Federal Trade Commission in response to subpoenas in the proceeding then and now pending before the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual trading as Bonequet Laboratories, Docket No. 3660; that it is not true, as set forth in said affidavit, that your affiant then "refused to answer any and all questions propounded to him by counsel" for the Federal Trade Commission; that your affiant did then refuse to answer certain questions propounded to him by counsel for the Federal Trade Commission, and that your affiant did so upon the advice of his attorney; that said attorney had then, prior to each of said dates, informed your affiant, and your affiant then believed, that the questions then propounded to your affiant and which your affiant then refused to answer were incompetent, irrelevant and immaterial, and that the Federal Trade Commission had no jurisdiction over your affiant or his business, hereinafter named;

4. That in connection with paragraph No. "4" in said affidavit, your affiant admits that on May 23, 1941, a purported Order was made herein; that said

purported Order was made pursuant to a petition in writing entitled "Application for an Order Requiring the Giving of Evidence"; that said petition is on file with the Clerk of this Court and reference thereto is hereby made for further particulars; that your affiant is not, and never has been guilty of contumacy or refusal to obey a subpoena issued to your affiant to appear before the Federal Trade Commission; that your [44] affiant is informed by his attorney, Eldon V. Soper, and believes and so states, that said purported Order is void as in excess of jurisdiction;

5. That it is true as alleged in paragraph No. "7." of said affidavit that your affiant did not appear before Edward E. Reardon, an Examiner of the Federal Trade Commission, on the 4th day of June, 1941; that at said time your affiant was ill and under the care of his physician and confined to his bed and was unable to attend such hearing without danger to his health in response to that certain purported Order Compelling Obedience to Subpoena issued out of the above-named Honorable Court in this proceeding under date of May 23, 1941, by Honorable Paul J. McCormick, a Judge of said Court;

6. That at the time and place referred to in said purported Order, Eldon V. Soper, Esquire, appeared for and on behalf of your affiant and as your affiant's attorney, and presented to said Edward E. Reardon, as such Examiner, a physician's certificate in writing showing that your affiant was then ill and under the care of his physician and unable to at-

tend such hearing without danger to his health, that prior to said 4th day of June, 1941, your affiant had retained said Eldon V. Soper as his attorney in the place and stead of Messrs. Canepa and Castruccio, attorneys at law, who had theretofore appeared for your affiant in the above mentioned proceeding before the Federal Trade Commission;

7. That in connection with paragraph No. "8." of said affidavit your affiant denies the inferential allegation appearing therein that the purported Order entered herein on May 23, 1941, compelled your affiant "to obey the subpoena of the Federal Trade Commission to appear and testify in Docket No. 3660 in the pending matter before the Federal Trade Commission";

8. That in connection with paragraph No. "9." of said affidavit your affiant denies that on July 7, 1941, before Edward E. Reardon, Trial Examiner of the Federal Trade Commission, your affiant [45] "refused to answer certain relevant and proper questions propounded to him by counsel for the Federal Trade Commission pertaining to the formula, composition, and ingredients of his product known as Bonequet Tablets or Bonequet Blood Building Tablets"; that none of the questions then propounded to your affiant by counsel for the Federal Trade Commission and which your affiant then refused to answer were or are competent, relevant, material, proper, or in the interests of justice; that your affiant then answered all questions propounded to him by counsel for the Federal Trade Commis-

sion except questions dealing with the quantitative amounts of the ingredients used by your affiant in the manufacture of his product, Bonequet Tablets; that your affiant then disclosed to counsel for the Federal Trade Commission the names of all ingredients used in his said product; that your affiant then gave the names of the manufacturers of said ingredients or the sources from which said ingredients are derived; that it is not true, as set forth in said affidavit, that "the questions and answers material in this connection appear at page 330 et seq. of the official transcript of the record in Docket 3660", nor that all the questions and answers material in said connection are set forth in said affidavit; that all the questions and answers dealing with the formula used by affiant in his business, hereinafter named, appear on page 327, line 9, at page 350, line 5, of said official transcript; that a full, true, and correct copy of that portion of said official transcript is attached hereto, marked Exhibit "A", and by this reference made a part hereof;

9. That in connection with paragraph No. "10." of said affidavit, your affiant denies that it is shown by the excerpts from the official record set out in said affidavit that your affiant refused to answer relevant and pertinent questions concerning the formula for his product, Bonequet Tablets; that it is true as set forth therein that your affiant refused to answer certain questions [46] then asked; that it is not true as set forth therein that your affiant

based his refusal to answer said questions "upon the excuse and pretext that such testimony would require him to divulge trade secrets and would irreparably injure him in his business and occupation", nor upon any excuse or pretext whatsoever; that your affiant did base his refusal to so testify upon the ground that said questions would require him to divulge trade secrets, and that in the event of such disclosure irreparable damage and injury to your affiant's said business would result; that the inferential allegation appearing therein that your affiant has disseminated false and misleading advertising is untrue; that it is not true as set forth therein that "in order to properly dispose of the issues now pending before it, it is essential for the Federal Trade Commission to have full and complete information concerning the formula" of your affiant's product; that the only information it is essential for the Federal Trade Commission to have in connection with the formula of your affiant's product has already been testified to by your affiant; that the inferential allegation appearing therein that your affiant has refused to testify with reference to said formula is untrue; that the only refusal of your affiant to testify with reference thereto is as stated hereinabove; that it is not true as set forth in said paragraph that if this Court sustains your affiant in refusing to divulge his trade secrets that this "will defeat the ends of justice and make it impossible for the Federal Trade Commission to function in the prevention of unfair and

deceptive acts and practices in commerce in connection with the sale and distribution of medicinal and patent prescriptions where a so-called secret formula is involved”;

10. That your affiant commenced doing business under the firm name and style of Boncquet Laboratories, at Glendale, California, on April 1, 1937; that on or about April 1, 1937, your affiant executed and filed with the County Clerk of the County of [47] Los Angeles, State of California, a certificate pursuant to the provisions of Section 2466 of the Civil Code of the State of California, in which certificate was set forth that affiant was doing business in the County of Los Angeles, State of California, as an individual under the firm name and style of Boncquet Laboratories, and stated the name in full of affiant as the owner and proprietor of the said business, and his place of residence; that affiant caused such certificate to be published once a week for four successive weeks in a newspaper published in said County of Los Angeles, State of California, as required by said Section 2466, and caused an Affidavit showing the publication of such certificate to be filed with the County Clerk of said County within thirty days after the completion of such publication;

11. That ever since the 1st day of April, 1937, your affiant has done business at Glendale, California, under the firm name and style of Boncquet Laboratories, and has conducted and operated the same individually and as sole owner and proprietor thereof;

12. That since your affiant commenced doing business as aforesaid your affiant did, to and including July 11, 1941, a net business to date of Three Hundred Four Thousand Seven Hundred Fifty and 01/100 Dollars (\$304,750.01), all of which has been derived from the sale of affiant's product, Boncquet Tablets; that during said time your affiant has spent the sum of One Hundred Fifteen Thousand Twenty-three and 42/100 Dollars (\$115,023.42) in advertising his said product, Boncquet Tablets; that due to the exceptional merit of your affiant's product, Boncquet Tablets, and because of the advertising done by your affiant as aforesaid, your affiant has created a valuable good will for his said business and product;

13. That in the manufacture of Boncquet Tablets your affiant uses Raw Liver Principle Extractive (Red blood cell maturing factor); that the raw liver principle is the discovery for which the Nobel [48] Prize for Medicine was awarded to Doctors Whipple, Minor and Murphy in 1935; that in addition to said Raw Liver Principle Extractive, which is an animal hemopoietin or blood builder, your affiant uses in the manufacture of Boncquet Tablets the following, and only the following, ingredients; dehydrated vegetable parsley concentrate, pure dried brewers' grain yeast, vitamin B-1, riboflavin (vitamin G or B-2), pure dehydrated milk whey, and dextrose; that each and all of said additional ingredients, except the dextrose, is a hemopoietin or blood builder; that a hemopoietic substance or blood

builder is a substance which, in combination with other hemopoietic substances, increases the red blood cell count and hemoglobin; that the combination of the said ingredients used by your affiant in the manufacture of Bonequet Tablets substantially increases and supplements the blood building qualities of the Raw Liver Principle Extractive so used by your affiant; that the dextrose used by your affiant in the manufacture of Bonequet Tablets is used only as a binder in order to promote cohesion in the tablets; that only sufficient dextrose is so used as to accomplish this result;

14. That your affiant owns the formula for said Bonequet Tablets; that the quantitative amounts of the ingredients used by your affiant in the manufacture of Bonequet Tablets are valuable trade secrets; that the formula used by your affiant in the manufacture of his said products has not been reduced to writing; that affiant has no patent for said formula, and that said formula is not patentable under the laws of the United States of America;

15. That in the event your affiant discloses the quantitative amounts of the ingredients used by your affiant in the manufacture of his said product, other persons could imitate your affiant's product; that your affiant is informed and believes, and on that basis alleges, that in the event your affiant did disclose the quantitative amounts of the ingredients used by your affiant in the manufacture of his said product that other persons would attempt to [49] simulate said product and to injure and destroy

your affiant's business and the good will thereof; that your affiant is informed by his attorney, Eldon V. Soper, and believes and so states, that Merle P. Lyon, attorney of record herein for the Federal Trade Commission, stated to said Eldon V. Soper on July 17, 1941, that if your affiant discloses the quantitative amounts of the ingredients in your affiant's said formula to the Federal Trade Commission in the proceeding now pending against your affiant before said Commission that said Commission will then disclose said quantitative amounts to others, and that said Merle P. Lyon was then obtaining witnesses for that purpose; that heretofore in said last mentioned proceeding one Pierre Auguste Boncquet testified as to the contents of a certain formula; that thereafter said Commission disclosed said formula to Dr. B. O. Raulston; that said formula was not nor is not affiant's formula; that the truth or falsity of all or any of the statements and claims made by your affiant in his advertising cannot be determined by disclosure of said quantitative amounts; that said Commission intends, if it obtains such information, to disclose it to others; that if said Commission obtains such information the same will be and become public property; that in the event the quantitative amounts of the ingredients in your affiant's said formula become public property that your affiant's business will be irreparably injured and destroyed;

16. That the efficacy of your affiant's product, Boncquet Tablets, has been demonstrated over a

period of more than four (4) years and by numerous blood counts of individuals taken before and after the use of Boncquet Tablets; that the truth of the statements and claims made by your affiant is his advertising can be demonstrated by eminent scientific authority and by blood counts which furnish incontestable proof of the merit of Boncquet Tablets; that these facts can be demonstrated to the Federal Trade Commission through blood counts without compelling your affiant to disclose [50] the quantitative amounts of the ingredients used by your affiant in the manufacture of Boncquet Tablets; that your affiant has offered such proof to the Federal Trade Commission and that such offer has been refused to date;

17. That your affiant has not used, and is not using, any unfair method of competition in commerce, or any unfair or deceptive act or practice in commerce within the meaning of the Federal Trade Commission Act, Act of September 16, 1914, C. 311, 38 Stat. 717, or as amended by Public—No. 447—75th Congress, 3d. Session, S.1077, approved and effective March 21, 1938 (U. S. Code, title 15, Sec. 41, et seq.) or otherwise; that the Federal Trade Commission has no jurisdiction over your affiant or his said business; that your affiant has not divulged any of the provisions of the Federal Trade Commission Act;

18. That by reason of the facts set forth hereinabove disclosure of the quantitative amounts of the

ingredients used in your affiant's said formula is not in the interests of justice;

Wherefore, Affiant prays that the contempt proceeding initiated by said Affidavit and Order to Show Cause be dismissed, and that your affiant, Frederic A. Clarke, be discharged therefrom.

FREDERIC A. CLARKE

Subscribed and sworn to before me, this 18 day of July, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk U. S. District Court,
Southern District of California

By J. M. HORN

Deputy Clerk. [51]

EXHIBIT "A"

Trial Examiner Reardon: Why don't you say: What was the composition of the tablets?

Mr. Lyon: Yes, all right.

By Mr. Lyon:

Q. What was the composition of the tablets?

A. In substance just about what we have now in our formula, which is printed right on our label.

Q. And what is that formula?

Trial Examiner Reardon: Well, a label declaration is not always a formula, of course. It may be a part of a formula. It is not required to put the entire formula on the label.

The Witness: I think it is entirely right though, under the law, Mr. Examiner, that everyone be compelled to show their ingredients right on the label.

Trial Examiner Reardon: Oh, there is no question about that, but I am only saying that I have had so much experience that I know that a label declaration does not require the full formula to be shown.

The Witness: Well, you couldn't, because——

Mr. Soper: We don't need to go into that.

Mr. Lyon: Let's not go into the argument.

Trial Examiner Reardon: I think we are talking about two different things. You are asking for the formula and he is talking about the label declaration.

Mr. Lyon: That is right.

Trial Examiner Reardon: I want to know what you want. [52]

Mr. Lyon: I want the formula. I don't care about the label declaration.

Mr. Soper: If that is the precise question, as to the entire formula, I want to interpose an objection, because I don't think that is a proper question. As I understand it, the claim is that there is misleading advertising here, and Mr. Lyon has stated to me that there is a question as to whether or not the product contains liver extract. Now, it seems to me that could be reached without forcing Mr. Clarke to disclose his entire formula, and I want to enter an objection.

Trial Examiner Reardon: Name the product you

mean and base your question on the product, and let's go ahead. I understand there were several products involved.

Mr. Lyon: Oh, no. There is only one product.

By Mr. Lyon:

Q. Isn't that right, Mr. Clarke? You are making just the one product? A. That is right.

Q. And you have always made just the one product, since April 1, 1937; is that correct? What was the answer to that?

A. Let me have that question again.
(The question was read.)

A. In substance, yes.

Q. And that is the bonequet Tablets?

A. Yes.

Trial Examiner Reardon: The product has had the same name? That is what Mr. Lyon refers to in his question. You have made the same product?

The Witness: Yes.

Trial Examiner Reardon: And you have sold the product under the same name? [53]

The Witness: Bonequet Tablets.

Trial Examiner Reardon: That is the question.

By Mr. Lyon:

Q. But you did change the formula from the one used by the corporation; is that correct?

A. Oh, yes.

Q. And was this formula originated by you or by someone else?

Mr. Soper: By "formula," you are referring to——

Mr. Lyon: The new one.

Trial Examiner Reardon: He just said he sold this product which is named since that time, 1937. Now, the question is: What is the formula?

Isn't that what you are asking?

Mr. Lyon: Yes. There was objection to it.

Mr. Soper: Now, if the question now pending is as to the contents of the formula, I wish to renew my objection at this time.

Trial Examiner Reardon: Just read the question pending.

(The record was read).

Trial Examiner Reardon: Well, the question is, Mr. Clarke, what is the formula of that product that you produced since some time in 1937, which you gave the date for?

The Witness: Well, one——

Trial Examiner Reardon: There is an objection to that, is there?

Mr. Soper: Yes, there is an objection.

Mr. Lyon: What is the ruling on it?

Trial Examiner Reardon: What would be the grounds for the objection, if you would like to state them on the record?

Mr. Soper: Yes. The objection is this: That, as I understand, the only claim made by the Commission is that the product manufactured by Mr. Clarke may not contain the liver, liver extract, and he exhibited to me a couple of analyses made for the Commission [54] by Government officials, and while the examination indicated that there was—at least

one of those examinations indicated that there was liver present, they were unable to ascertain what the liver content was. Now, if the only question is as to the liver content, as to whether or not it contains liver, it seems to me that question could be answered categorically.

Trial Examiner Reardon: Well, the question at the present time is what the stenographer will read, and I will overrule the objection, and that will settle the question about the liver and whether it is there or not.

Mr. Soper: Of course, it does that, but it also compels him to disclose the formula.

Trial Examiner Reardon: I can only go according to the question and rule on the question.

Will you read the question?

(The question was read.)

The Witness: Well, it consists of, one, Raw liver principal extracted——

Trial Examiner Reardon: Does it state the quantity?

The Witness: No, it doesn't. In paranthesis, "(Red blood cell maturing factor)."

By Mr. Lyon:

Q. What was that last part again?

A. "(Red blood cell maturing factor)."

Q. Maturing?

A. Yes. That is a description for the raw liver principal extract.

"2. Dehydrated vegetable parsley concentrate."

Q. Parsley?

A. Parsley, p-a-r-s-l-e-y, concentrate.

“3. Pure dried brewers’ grain yeast.

“4. Vitamin B-1. [55]

“5. Riboflavin,”

and then in parenthesis,

“(Vitamin G or B-2).

“6. Pure dehydrated milk whey.

“7. Dextrose, as a binder.”

Trial Examiner Reardon: Those are all the ingredients?

The Witness: That is right.

Trial Examiner Reardon: But that does not state the formula. The formula calls for the quantities.

By Mr. Lyon:

Q. Yes, what are the proportions of those different ingredients?

A. Of course, that is my trade secret.

Trial Examiner Reardon: Do you object?

Mr. Soper: Yes, I do.

Trial Examiner Reardon: I will have to overrule the objection and direct the witness to answer.

The Witness: Well, I would be divulging all my trade secrets.

Trial Examiner Reardon: I know that, but I can’t help that. I have to direct you to answer. You are selling the product, and we are entitled to know.

The Witness: Well, I decline to answer, to divulge this trade secret.

Mr. Soper: As I understand it, Mr. Clarke, you

are not unwilling to let the Commission know that you actually use liver?

The Witness: Oh, no. No, I can show you bills for thousands of dollars from the Swift Company, showing that I used liver, and I am not buying liver just to go out and throw it away and just to tell the Federal Trade Commission.

Trial Examiner Reardon: That isn't the point. The point is that the question calls for the formula, and you have only named the ingredients, without naming the amounts, proportionate amounts, [56] that are used in constructing the product, and the question has not been answered.

Now, the only thing I can ask you is: Do you decline to answer on the ground that your answer would tend to incriminate or degrade you?

The Witness: Well, it wouldn't tend to incriminate or degrade me. It would deprive me of my constitutional property, my constitutional rights.

I don't mind—well, Mr. Examiner, I might state that due to the information that I have published about this as a blood builder, I already have a very serious competition that is imitating my product.

Trial Examiner Reardon: Has any formula been admitted into evidence here that has been analyzed,—of this product?

Mr. Lyon: Yes.

Trial Examiner Reardon: Has there been any analysis introduced in evidence here?

Mr. Lyon: Yes.

Trial Examiner Reardon: Show the witness the

analysis and ask him if that is the analysis of the product, as produced and sold by him since the date of 1937 that he has stated.

Mr. Lyon: Yes.

By Mr. Lyon:

Q. Will you look at Commission's Exhibit 19-A and 19-B, Mr. Clarke, being an analysis made by the Food & Drug Administration of the United States.

Mr. Soper: Are these in evidence.

Mr. Lyon: Yes, they are, as Commission's Exhibit 19-A and B.

The Witness: Haven't you a copy of the brief wherein they state that—they indicate that the liver principal is in the product?

Mr. Lyon: Well, the brief——

Trial Examiner Reardon: That is not the point. Off the [57] record, a moment.

(Discussion off the record).

Trial Examiner Reardon: On the record. I direct you to answer.

The Witness: I refuse to answer, because it would just put me out of business.

Trial Examiner Reardon: Have you any further questions, outside of the formula?

Mr. Lyon: Before I take further proceeding in this matter, I would like to ask Mr. Clarke a few questions relative to each of these ingredients, without going into the proportions,——

Trial Examiner Reardon: All right.

Mr. Lyon: —and get that clear for the record,

so that we will know what we are talking about when we talk about these different ingredients.

Trial Examiner Reardon: All right.

By Mr. Lyon:

Q. You spoke about using the principal, raw liver principal extract.

A. I haven't a picture of the machinery here, but you have it in the original folder, which we no longer use. I would like to show the Examiner a picture of the battery of machinery.

Trial Examiner Reardon: Of course, I will see that later on, all these exhibits here.

The Witness: It is very important, so far as I am concerned.

Here it is (indicating). You see, this is stainless steel equipment, and we have worked out a method of going after this factor from Raw liver.

Trial Examiner Reardon: We will not ask you to disclose how you get this factor out of the liver.

[58]

The Witness: I don't mind telling you. The only thing I know is that we, from this raw liver that we obtain from Swift, and we already have Federal exemption from meat inspection, and this liver is delivered to us without anyone touching it, that is, the pluck is taken right out of the carcass and the liver is cut away and certain other of the endocrines, and is delivered to us, you might say, intact, so that we get the full benefit of it, and we take it and we digest it, and then we pull it through dicallite, which is even a finer clay than Fuller's Earth,

and by a vacuum process we extract about 91½ to 101½ per cent of this liver factor. The rest we wash down a sump hole. We combine this with the other ingredients, and we know by literally thousands of scientific tests——

By Mr. Lyon:

Q. Just a minute. You take this raw liver and run it through these machines, and it comes out in the form of liver extract; is that right?

A. That is right. This factor, of course, it is.

Q. Then you call it a red blood cell maturing factor?

A. That is the correct name for it. Kracke calls it that, who is our highest authority on blood, I think, in the United States. He calls it the raw liver principal, and so does Hayden of the Creel Institute at Cleveland, calls it the raw liver principal.

Q. And it is commonly called liver extract?

A. No.

Q. It is liver?

A. It is liver, absolutely.

Q. It is not the raw liver?

A. It is raw liver. We use heat, but we never go above body temperature, and we heat it by electricity. This results [59] in a very uniform type of heating. That is, we haven't got gas, which may go up and down. Electricity is constant, and when we get this factor we know that we have discovered the secret of extracting this particular principal that unquestionably makes it the greatest blood builder that is sold to the public today.

Trial Examiner Reardon: I don't think that counsel is interested in the secret method of extracting it, but in the result. What is the thing that you put in that ingredient which is extracted? What is it, and how much?

By Mr. Lyon:

Q. It is liver extract?

A. Call it the Raw Liver Principal, because your Government doctors know what I am talking about.

Trial Examiner Reardon: What proportion of the entire product does that consist of?

The Witness: That is what I don't want to divulge.

By Mr. Lyon:

Q. You claim your trade secret is the method in which you make this raw liver principal?

A. That is right.

Q. Or the proportion in which you mix it up?

A. The way I mix it with the other ingredients, which make it a remarkable blood builder.

Q. I am not asking you how it builds up. I am asking you just what proportions you use.

A. I don't want to tell the proportions, because, you see, all these other things are blood building powers——

Q. Do you claim that the proportion itself would be a trade secret?

A. Oh, absolutely. You see, Mr. Lyon, here—do you want to put this off the record?

Mr. Lyon: Off the record.

Trial Examiner Reardon: This is off the record.

(Discussion off the record) [60]

Trial Examiner Reardon: On the record.

By Mr. Lyon:

Q. Now, Mr. Clarke, you said that the second ingredient that you use was the dehydrated vegetable parsley concentrate? A. That is right.

Q. Just what do you mean by that?

A. Well, we purchase from a group that take parsley beds out at El Monte, and they fertilize these parsley beds to the extent of about five or six thousand pounds of fertilizer, way out of proportion from what you would use if you were just going to raise parsley, and so we have found that the parsley concentrates that we use will carry about from three to four hundred per cent more chlorophyll, and, of course, the natural vitamins and the minerals, and all those are very efficacious for blood building, because they have——

Q. Just a minute, Mr. Clarke. Don't go into the argument about how efficacious it is, but tell me what the concentrate is. Is it the same as ground parsley? A. Oh, no.

Q. Or pulverized?

A. Oh, yes, it is a very fine powder.

Q. You take the common vegetable parsley and pulverize it?

Trial Examiner Reardon: The question isn't whether he does. The question is how much.

By Mr. Lyon:

Q. You refuse to tell me how much is in it?

A. Yes.

Q. That is a part of the so-called trade secret?

A. I wouldn't say "so-called." It is a trade secret.

Q. You claim that to be a trade secret?

A. Yes. [61]

Q. This third ingredient you spoke of was just dried brewers' yeast? A. Yes.

Q. What is that?

A. That is from the Anheuser-Busch Company of St. Louis. They have developed a strain G-yeast, which we purchase from them, that has about the highest natural vitamin B-1 units of any yeast that is manufactured.

You see we just do business with Anheuser-Busch, and we have entree to their laboratories.

Trial Examiner Reardon: That is all right.

By Mr. Lyon:

Q. You get the yeast and mix it up with your other ingredients? A. That is right.

Q. Now, you spoke also about vitamin B-1.

A. Of course, there is the natural B-1 in——

Q. Do you mean by that the vitamin B-1, as included in some of these other ingredients, or by itself? A. Yes.

Q. As a pristine product? A. Yes.

Trial Examiner Reardon: You don't add the crystalline B-1?

The Witness: Oh, yes, we do.

Trial Examiner Reardon: That is, you add B-1 that comes in crystals?

The Witness: Yes. We get that from the Merck Company.

Mr. Soper: You don't have to tell from whom you get this stuff.

The Witness: I don't mind.

Mr. Soper: All they want to know is what it is.

The Witness: What we do is to do business with the [62] finest companies there are.

By Mr. Lyon:

Q. That vitamin B-1 then is in the form of crystals? A. Pure crystalline vitamin B-1.

Q. And that you obtain from a wholesale drug company? A. That is right.

Q. And it is mixed then with the other ingredients?

A. That we do that, Mr. Lyon, in order to get the best results.

Q. Regardless of why you do it.

A. I want to see that the individual who takes this is protected.

Trial Examiner Reardon: We are not going into that question.

By Mr. Lyon:

Q. We are not going into the efficacy of it at this time. Now, you also spoke about riboflavin—

A. Riboflavin.

Q. —as an ingredient. Just what is that, Mr. Clarke?

A. Well, riboflavin is really vitamin G or B-2, and it is a scientific fact that liver contains riboflavin; in fact, it is the finest sort of riboflavin.

Q. What form is it in?

A. It is in the form of an active ingredient.

Trial Examiner Reardon: Do you buy it in the form in which you put it in?

The Witness: No. It is in the liver.

Trial Examiner Reardon: It is in the liver?

The Witness: But you have a right to make that claim.

By Mr. Lyon:

Q. It is in the liver itself?

A. It is in the liver itself. [63]

Q. But it is something you have listed as an ingredient?

A. I want to clarify that. You said not to use the name of the company, but we also buy the B-2 from the Merck Company.

Trial Examiner Reardon: This riboflavin?

The Witness: That is what we call it.

Trial Examiner Reardon: You buy riboflavin from them?

The Witness: That is right.

Trial Examiner Reardon: That comes in crystal form?

The Witness: In crystal.

Trial Examiner Reardon: In the B-2?

The Witness: In the B-2.

Trial Examiner Reardon: Then do you buy the product, riboflavin, in crystal form?

The Witness: That is right.

Mr. Soper: It is also contained in the liver, as I understand it?

The Witness: Oh, yes, in very big quantities in liver.

By Mr. Lyon:

Q. But you also get it in crystalline form and add it to the other ingredients; is that correct?

A. That is right.

Q. Now, the pure dehydrated milk whey that you spoke about,—what is that?

A. That is the finest milk whey that we can buy, and we get that from the Tillima Cheese Company.

Trial Examiner Reardon: It doesn't make any difference where you get it. Milk whey is an ordinary substance. What is the quantity of it that you use?

The Witness: Of course, I don't want to tell the quantity.

By Mr. Lyon: [64]

Q. You refuse to give the quantity that you use? Is that correct? You claim that to be a part of a trade secret?

A. Absolutely.

Q. Now, you spoke about dextrose, Mr. Clarke.

A. As a binder; dextrose, as a binder.

Q. It is used only as a binder?

A. Yes.

Trial Examiner Reardon: What is the quantity of the dextrose?

By Mr. Lyon:

Q. What is the quantity?

A. Sufficient to bind the tablet.

Q. And you refuse to give the amount or the proportion of dextrose that you use?

A. Oh, yes. I am not selling dextrose. I am selling a blood builder, you see.

Mr. Lyon: If the Examiner, please, the witness on the stand is charged with false and misleading advertising, and in view of the public interests involved in this case, I believe that he should be required to give the proportions and percentages of these various ingredients, and the manner in which they are used. I therefore insist upon an answer to the previous question.

Trial Examiner Reardon: I directed the witness to answer, and I understand on the advice of counsel—Mr. Soper, is that right—he has declined to answer?

Mr. Soper: Well, I think the record shows that the witness has declined to answer.

Trial Examiner Reardon: But you haven't advised him to decline to answer, have you? It is not on your advice, is it?

Mr. Soper: Well, I think when you ask that question you place an attorney in an impossible position. Under the attorney's oath, it is his duty to protect his client at all costs, [65] and when you ask me that question, I have to sit here——

Trial Examiner Reardon: Yes, I will not ask you to answer it. The client has refused to answer it. Then there is nothing further to be done except to know whether you are going to take any steps by way of court procedure, Mr. Lyon, to obtain an answer to the question.

Mr. Lyon: Yes. I intend to take such proceedings, and for that reason I should like to have a short continuance of this particular case.

Trial Examiner Reardon: The question then comes to what time will we adjourn it here, for the purpose of your application to the court?

Mr. Soper: I wonder if, before there is any adjournment, I could have the opportunity to ask a couple questions?

Trial Examiner Reardon: Oh, yes, Mr. Soper.

Mr. Soper: It is possible that some light might be thrown on the matter.

Trial Examiner Reardon: Oh, yes, Mr. Soper.

Cross Examination

By Mr. Soper:

Q. Mr. Clarke, it is true, is it not, that the addition of other things to the liver extract increases the therapeutic value of the liver extract itself?

A. Very much so.

Q. And with the exception of the dextrose used as a binder, do the other ingredients used in your product, in addition to the liver extract, all tend to increase its therapeutic value?

A. Very much so.

Q. In other words, it is the combination of these various ingredients which gives your product its peculiar efficacy; is that correct?

A. I would say uniqueness, because it is a very unique [66] formula, not questioned by any scientific men—

Mr. Lyon: Just a minute. I object to the last statement.

Trial Examiner Reardon: That may be stricken, —not questioned by any scientific men.

Mr. Soper: Just the last part there, I take it?

Trial Examiner Reardon: Yes. “Not questioned by any scientific men,” those words, may be stricken.

Mr. Soper: That is all at this time.

Trial Examiner Reardon: All right.

The Witness: But I am willing to supply you with scientific tests——

Trial Examiner Reardon: No. That is not called for at the present time.

Mr. Lyon: Mr. Soper, you have no further questions?

Mr. Soper: No. Here is the thing that occurs to me——

Trial Examiner Reardon: Let's go off the record.

Mr. Soper: We might as well.

Trial Examiner Reardon: Off the record.

(Discussion off the record)

Trial Examiner Reardon: On the record.

Redirect Examination

By Mr. Lyon:

Q. Mr. Clarke, I want to ask you this: If you could be assured that your statements with reference to the various proportions of these ingredients would not become public property, but would be kept secret by the Commission for only their own personal use——

A. You couldn't do that.

Q. —would you be willing to state them?

A. You couldn't do that. No. [67]

Q. If we assured you they would be kept in confidence?

A. You couldn't assure me of that, because in five or six years, some other clerk might have access to that file, and he would divulge it.

Now, if it is the American way to put me out of business because I won't divulge my trade secret, why, I am willing to go out of business, because I can make a living very easily in other ways.

Q. You understand, Mr. Clarke, we are trying to represent the public here, trying to protect them from false and misleading advertising,—

A. All right.

Q. —and that the Commission itself has no personal interest, one way or the other, except to protect the public?

A. I feel that. I know that.

Q. And that is all we care about, and we don't want to give any benefit or advantage to your competitors.

A. That is right. On the other hand, I always understood that the Federal Trade Commission had to have an injured competitor. Is that true?

Q. That is not true under the present law.

A. I see. I thought they had. Dr. Bonquet is the one that instituted this. He is the one that instituted these proceedings against me.

Mr. Lyon: There is no question of any injury to competitors involved here at all.

Trial Examiner Reardon: Now, wait a minute. This is off the record.

(Discussion off the record).

Mr. Lyon: That is all.

Mr. Soper: That is all. [68]

Trial Examiner Reardon: The hearing is now, at 11:45 o'clock a. m., Pacific Standard time, adjourned to be reconvened at 10:00 o'clock a. m., Pacific Standard time, on the 18th day of July, 1941, in Room 333-F, United States Post Office Building, at Los Angeles, California.

(Whereupon, at 11:45 o'clock a. m., July 7, 1941, the hearing was adjourned until July 18, 1941, at 10:00 o'clock A.M.)

[Endorsed]: Filed Jul. 18, 1941. [69]

[Title of Cause.]

ORDER

This matter came on this day to be heard upon the order heretofore issued on July 14, 1941 against the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of this court in refusing to obey the order of this court entered herein on May 23, 1941, ordering said defendant to appear and testify before the duly appointed trial examiner of the Federal Trade Commission in a certain matter now pending before the Federal Trade Commission entitled In the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, FTC Docket No. 3660;

It further appearing to the court from the motion and affidavit of Merle P. Lyon, special assistant to W. T. Kelley, Chief Counsel of the Federal Trade Commission filed in support of said order to show cause, and from the counter-affidavit of Eldon V. Soper, counsel for the defendant, and after a hearing upon said motion, affidavit, and counter-affidavit, and after arguments of counsel, and upon full consideration thereof, that the defendant Frederick A. Clarke is guilty of contempt of this court in refusing to obey the order of this court entered May 23, 1941, in refusing to answer lawful and relevant questions propounded to him on July 7, 1941 at a hearing held before Edward E. Reardon, Trial Examiner of the Federal Trade Commission, in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Docket No. 3660 FTC; and that said defendant was not privileged as a matter of law to refuse to answer said questions on the ground that to do so would disclose a trade secret; and it further appearing to the court that said defendant should be afforded an opportunity to purge himself of contempt by again appearing before the trial examiner [70] of the Federal Trade Commission and answering the questions which he has heretofore refused to answer;

It is Ordered that the defendant Frederick A. Clarke be and appear as a witness at a hearing to be held on July 22, 1941 at 2. p. m. in Room 229, Post Office Building, Los Angeles, California

in the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, Docket No. 3660 FTC, and that said defendant then and there answer the question, "What are the proportions of the different ingredients in the product Boncquet Tablets?", and to answer any and all other relevant and proper questions respecting the quantitative formula for his product Boncquet Tablets.

July 18, 1941.

BEN HARRISON,

United States District Judge.

[Endorsed]: Filed Jul. 28, 1941. [71]

[Title of Cause.]

NOTICE OF MOTION

Mr. Frederick A. Clarke,
1418 S. Glendale Ave.
Glendale, California.

Please Take Notice that on Monday, July 28, 1941, at 10:00 A. M., or as soon thereafter as counsel can be heard, I shall present to Judge Benjamin Harrison, Presiding Judge of the District Court of the United States for the Southern District of California, in the court room commonly occupied by him in the Post Office Building, Los Angeles, California, a petition (copy of which is hereto attached and served upon you), and shall pray for the entry of an order adjudging you in contempt of court and fixing your punishment

therefor in the manner and form to be then and there fixed by the court; at which time and place you may appear if you see fit.

MERLE P. LYON,

Special Assistant to the Chief
Counsel, Federal Trade
Commission.

State of California,
County of Los Angeles—ss.

Merle P. Lyon, being first duly sworn, deposes and says that he served the foregoing notice by delivering a copy thereof together with a copy of the petition therein referred to personally to Frederick A. Clarke on July 25, 1941, at 9:55 A. M.

MERLE P. LYON

Subscribed and sworn to before me, this 25th day of July, 1941.

(Seal)

R. S. ZIMMERMAN,

Clerk U. S. District Court,
Southern District of California,

By FRANCIS E. CROSS,
Deputy.

[Endorsed]: Filed Jul. 28, 1941. [72]

[Title of Cause.]

PETITION FOR ORDER ADJUDGING
DEFENDANT IN CONTEMPT

Now comes the Federal Trade Commission, petitioner in the above entitled matter, by Merle P. Lyon, Special Assistant to W. T. Kelley, Chief Counsel of the said Federal Trade Commission, and respectfully shows unto the court as follows:

1. On July 14, 1941, pursuant to a motion supported by affidavit filed herein, an order was entered in the above entitled matter ordering the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of court for refusing to obey an order of this court entered May 23, 1941, ordering and directing the said defendant to appear and testify in a certain matter now pending before the said Federal Trade Commission entitled in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Federal Trade Commission Docket No. 3660.

2. Pursuant to said order of July 14, 1941, a hearing on said order to show cause was duly had on July 18, 1941 before Presiding District Judge Benjamin Harrison; that said court thereupon rendered his opinion holding that the defendant was not privileged to refuse to answer the questions which he had been asked and refused to answer at a hearing held July 7, 1941 in the Matter of Frederick A. Clarke, an individual trading as Bonequet Laboratories, Docket No. 3660 before a

trial examiner of the Federal Trade Commission; that said defendant was not privileged as a matter of law to refuse to disclose to the said Federal Trade Commission the quantitative formula for his product Bonquet Tablets; and that his refusal to do so was in contempt of this court. The court thereupon ordered the defendant Frederick A. Clarke to appear on July 22, 1941 at 2. p. m. in the Post Office Building, Los Angeles, California before the duly appointed trial examiner of the Federal Trade Commission, [73] and then and there to answer the questions relative to the quantitative formula for his product Bonquet Tablets which he had on July 7, 1941 been asked and which he had then refused to answer on the ground that said questions compelled the disclosure of a trade secret. This court in particular ordered said defendant to answer the question, "What are the proportions of the different ingredients in Bonquet Tablets?"

3. Your petitioner further shows unto the court that on July 22, 1941, the said defendant Frederick A. Clarke appeared at the time and place above set forth, but refused to answer said questions or to disclose his quantitative formula for his product Bonquet Tablets; all of which will appear from the official transcript of said Federal Trade Commission hearing, the pertinent excerpts from which are as follows:

"Q. Mr. Clarke, so far I have tried to keep off of controversial ground, and I now come

to the point that was raised before the District Court for the Southern District of California in the contempt proceeding instituted against you in the matter entitled; Federal Trade Commission vs. Frederick A. Clarke, No. 1553; and I call upon you now for the quantitative formula for your product, Bonquet Tablets, and direct you to answer the question: What are the proportions of the different ingredients in Bonquet Tablets?

A. Well, I decline to answer the question because I would have to divulge my trade secrets and method of manufacturing the product.

Trial Examiner Reardon: You are directed to answer.

The Witness: I decline to answer.

Mr. Lyon: I wish, at this time, to call Mr. Clarke's attention to the fact that he was present in open court——

Trial Examiner Reardon: No, don't—he was there; he will answer for himself.

Mr. Lyon: (Continuing)—and I instruct him that unless he answers, I will take further proceedings in that matter now pending before the *the* District Court for the Southern District of California. You still refuse to answer?

The Witness: I do, on the ground that Congress has [74] never passed a law on the ground that a man has to divulge trade secrets.

Mr. Lyon: Mr. Examiner, I therefore ask a continuance of the case to a short date to be fixed by the Examiner and in the meantime I intend to take further steps to enforce the order in the contempt proceeding.—”

(Whereupon, at 3:35 p. m. *July, 1941*, the hearing in the above entitled matter was adjourned to July 25, 1941 at 10:00A. M.)

4. Your petitioner further shows that the defendant, Frederick A. Clarke, by his refusal to answer the questions as directed by this court in its opinion rendered on July 18, 1941 after a hearing on the order to show cause why he should not be held in contempt of court, has not purged himself of contempt, but on the contrary still remains in defiance and contempt of the lawful orders of this court, and is subject to the penalties provided by law for civil contempt.

Wherefore, Your Petitioner Prays that an order may be entered by this court adjudging the said defendant Frederick A. Clarke guilty of contempt in disobeying the order of this court, and that he be punished therefor in the manner provided by law and as may be found just and adequate in the discretion of the court.

FEDERAL TRADE COMMISSION,
By MERLE P. LYON,

Special Assistant to W. T. Kelley,
Chief Counsel, Federal Trade
Commission.

State of California,
County of Los Angeles—ss.

Merle P. Lyon, being first duly sworn, deposes and says that he is a special assistant to the Chief Counsel of the Federal Trade Commission; that he is the duly appointed and qualified agent of the petitioner in this behalf; that he has read the above and foregoing petition by him subscribed, and that the matters and things contained therein are true.

MERLE P. LYON

Subscribed and sworn to before me, this 24th day of July, 1941.

(Seal)

R. S. ZIMMERMAN,
Clerk U. S. District Court,
Southern District of California.

By EDMUND L. SMITH,
Deputy.

[Endorsed]: Filed Jul. 28, 1941. [75]

[Title of Cause.]

MOTION FOR ORDER TO SHOW CAUSE.

Now comes the Federal Trade Commission, petitioner in the above-entitled cause, and moves the Court for the entry of an order directing the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of court

for failure and refusal to comply with the order of this court entered May 23, 1941, ordering and directing said defendant to appear and testify in a certain matter now pending before the said Federal Trade Commission entitled In the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, Federal Trade Commission Docket No. 3660; and also for his failure and refusal to obey an order of this court entered on July 18, 1941 in the above-entitled cause ordering said defendant to appear and testify on July 22, 1941 at a hearing before a trial examiner of the Federal Trade Commission in Federal Trade Commission Docket No. 3660 and to answer the question, "What are the proportions of the different ingredients in Boncquet Tablets?"

MERLE P. LYON,

Attorney for Federal Trade
Commission,

Washington, D. C. [76]

[Title of Cause.]

AFFIDAVIT SUPPORTING MOTION
TO SHOW CAUSE.

Merle P. Lyon, being first duly sworn, deposes and says:

1. That he is a special assistant to W. T. Kelley, Chief Counsel for the Federal Trade Commission, Washington, D. C., petitioner in the above entitled

cause, and is the duly appointed and qualified agent of the petitioner in this behalf;

2. That on July 14, 1941, pursuant to a motion supported by affidavit filed herein, an order was entered in the above-entitled matter ordering the defendant Frederick A. Clarke to show cause why he should not be punished for contempt of court for refusing to obey an order of this court entered May 23, 1941, ordering and directing the said defendant to appear and testify in a certain matter now pending before the said Federal Trade Commission entitled in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Federal Trade Commission Docket No. 3660;

3. That pursuant to said order of July 14, 1941, a hearing on said order to show cause was duly had on July 18, 1941 before Judge Benjamin Harrison; that said court thereupon rendered its opinion holding that the defendant was not privileged as a matter of law to refuse to answer the questions which he had been asked and had refused to answer at a hearing held July 7, 1941 before a trial examiner of the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Docket No. 3660; that said defendant was not privileged as a matter of law to refuse to disclose to the said Federal Trade Commission the quantitative [77] formula for his product Bonequet Tablets, and holding that his refusal to do so was in contempt of this court;

4. That this Court thereupon ordered the de-

fendant Frederick A. Clarke to appear on July 22, 1941, at 2 p. m. in the Post Office Building, Los Angeles, California, before the duly appointed trial examiner of the Federal Trade Commission, and then and there to answer the questions relative to the quantitative formula for his product Bonquet Tablet which he had on July 7, 1941 been asked and which he had then refused to answer on the ground that said questions compelled the disclosure of a trade secret. That this Court in particular ordered said defendant to answer the question, "What are the proportions of the different ingredients in Bonquet Tablets?";

5. That on July 22, 1941, the said defendant Frederick A. Clarke appeared at the time and place above set forth, but refused to answer said questions or to disclose his quantitative formula for his product Bonquet Tablets all of which will appear from the official transcript of said Federal Trade Commission hearing, the pertinent excerpts from which were as follows:

"Q. Mr. Clarke, so far I have tried to keep off of controversial ground, and I now come to the point that was raised before the District Court for the Southern District of California in the contempt proceeding instituted against you in the matter entitled Federal Trade Commission vs. Frederick A. Clarke, No. 1553; and I call upon you now for the quantitative formula for your product Bonquet Tablets, and direct you to answer the question; What are

the proportions of the different ingredients in Boncquet Tablets?

A. Well, I decline to answer the question because I would have to divulge my trade secrets and method of manufacturing the product.

Trial Examiner Reardon: You are directed to answer.

The Witness: I decline to answer.

Mr. Lyon: I wish at this time to call Mr. Clarke's attention to the fact that he was present in open court——

Trial Examiner Reardon: No, don't—he was there; he will answer for himself. [78]

Mr. Lyon: (continuing) —and I instruct him that unless he answers, I will take further proceedings in that matter now pending before the District Court for the Southern District of California. Do you still refuse to answer, Mr. Clarke?

The Witness: I do, on the ground that Congress has never passed a law on the ground that a man has to divulge trade secrets.

Mr. Lyon: Mr. Examiner, I therefore ask a continuance of the case to a short date to be fixed by the Examiner, and in the meantime I intend to take further steps to enforce the order in the contempt proceeding."

(Whereupon at 3:35 p. m. July 22, 1941, the hearing in the above entitled matter was adjourned to July 25, 1941 at 10:00 A. M.)

6. That the defendant, Frederick A. Clarke, by his refusal to answer the questions as directed by *his* court in its opinion rendered on July 18, 1941, after a hearing on the order to show cause why he should not be held in contempt of court, has not purged himself of contempt, but on the contrary still remains in defiance and contempt of the lawful orders of this court, and is subject to the penalties provided by law for civil contempt.

MERLE P. LYON

Attorney for Federal Trade
Commission, Petitioner.

Subscribed and sworn to before me, this 28th day
of July, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk U. S. District Court,
Southern District of Cali-
fornia.

By J. M. HORN

Deputy [79]

[Endorsed]: Motion and Affidavit for Order to
Show Cause Why Defendant Should Not Be Pun-
ished for Contempt. Filed Jul. 28, 1941. [80]

[Title of Cause.]

ORDER DIRECTING DEFENDANT TO SHOW
CAUSE

It appearing by affidavit of Merle P. Lyon, special
assistant to W. T. Kelley, Chief Counsel of the

Federal Trade Commission, sworn to on the 28th day of July, 1941, that the defendant Frederick A. Clarke refused to answer a question at the taking of his testimony as a witness before a trial examiner of the Federal Trade Commission in a certain matter pending before the said Federal Trade Commission entitled in the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories, FTC Docket No. 3660 at a hearing held at 2 p. m. July 22, 1941 in the Post Office Building, Los Angeles, California, after having been directed to do so by order of this court; and the court being fully advised in the premises;

It Is Ordered that the defendant Frederick A. Clarke be and he is hereby directed to show cause before this court at 11 A. M. on the 30th day of July, 1941, why he should not be punished for contempt of this court for failure and refusal to comply with the order of this court made on May 23, 1941 ordering said defendant to appear and testify before a trial examiner of the Federal Trade Commission, and also for failure and refusal to comply with the order of this court made on July 18, 1941, ordering said defendant to appear and testify before a trial examiner of the Federal Trade Commission and then and there specifically to answer the question, "What are the proportions of the different ingredients in Boncquet Tablets?."

Service of this order upon the said defendant or

upon his attorney of record, Eldon V. Soper, Esq. shall be sufficient [81] service thereof.

July 28, 1941.

BEN HARRISON

United States District Judge.

[Endorsed]: Filed July 28, 1941. [82]

[Title of District Court and Cause.]

DEMURRER

Comes Now Frederic A. Clarke, named and sued herein as Frederick A. Clarke, the Defendant and Respondent in the within and above mentioned proceeding, and demurs to the Affidavit Supporting Motion to Show Cause filed herein on July 28, 1941, on the following, and each of the following, grounds, to wit:

I.

That said affidavit does not state facts sufficient to constitute a cause of contempt against the Defendant and Respondent.

II.

That said affidavit is insufficient to confer jurisdiction on the above entitled Honorable Court to try or punish the Defendant and Respondent for contempt.

Wherefore, Defendant and Respondent prays that this demurrer be sustained and that the contempt

proceeding initiated by or based upon said affidavit be dismissed.

ELDON V. SOPER

Attorney for defendant Re-
spondent Frederic A. Clarke.

[Endorsed]: Filed Jul. 30, 1941. [83]

[Title of District Court and Cause.]

MOTION TO STRIKE

Now Comes Frederic A. Clarke, named and sued herein as Frederick A. Clarke, the Defendant and Respondent in the within and above entitled proceeding, and moves to strike from the Affidavit Supporting Motion to Show Cause filed herein on July 28, 1941, the following, and each of the following, portions thereof, to wit:

1. That portion of paragraph 3 of said affidavit commencing with the word "that" and page 1, line 25, thereof and continuing to and including the word "Tablets" on page 2, line 2, thereof, and reading as follows:

"that said court thereupon rendered its opinion holding that the defendant was not privileged as a matter of law to refuse to answer the questions which he had been asked and had refused to answer at a hearing held July 7, 1941 before a trial examiner of the Federal Trade Commission in the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories,

Docket No. 3660; that said defendant was not privileged as a matter of law to refuse to disclose to the said Federal Trade Commission the quantitative formula for his product Bonequet Tablets;”

2. That portion of paragraph 3 of said affidavit commencing [84] with the word “and” on page 2, line 2, thereof, and continuing to and including the word “court” on page 2, line 3, thereof, and reading as follows:

“and that his refusal to do so was in contempt of this Court.”

That said motion is made upon the grounds that the foregoing portions of said paragraph 3 are, and each of them is:

- (a) Incompetent;
- (b) Irrelevant;
- (c) Immaterial;
- (d) Sham;
- (e) Redundant;
- (f) Surplusage; and an
- (g) Attempt to vary or contradict a judicial record by parol or extrinsic evidence.

Dated: July 30, 1941.

Respectfully submitted,

ELDON V. SOPER

Attorney for Respondent and
Defendant Frederic A. Clarke

[Endorsed]: Filed Jul. 30, 1941. [85]

[Title of District Court and Cause.]

AFFIDAVIT OF FREDERIC A. CLARKE IN
RE CONTEMPT. (No. 2)

Now Comes Frederic A. Clarke, sued and cited herein as Frederick A. Clarke, and, in answer and response to the Affidavit Supporting Motion to Show Cause made in this proceeding by Merle P. Lyon, and subscribed and sworn to by said Merle P. Lyon on July 28, 1941, before R. S. Zimmerman, Clerk of the above-named Honorable Court, and filed herein on said date, makes affidavit as follows, to wit:

United States of America
Southern District of California
Central Division—ss.

State of California
County of Los Angeles—ss.

Frederic A. Clarke, being first duly sworn, deposes and says:

1. That your affiant is the Respondent named in that certain Order Directing Defendant to Show Cause issued out of the above named Honorable Court in this proceeding under date of July 28, 1941, by Honorable Ben Harrison, a Judge of said Court; that your affiant is the same person as Frederick A. Clarke who is named in said Order [86] as the Defendant and Respondent herein;

2. That the Affidavit Supporting Motion to Show Cause made in this proceeding by Merle P. Lyon, and subscribed and sworn to by said Merle P. Lyon

on July 28, 1941, before R. S. Zimmerman, Clerk of the above-named Honorable Court, and filed herein on said date, does not state facts sufficient to constitute a cause of contempt against your affiant;

3. That in connection with paragraph No. "4" of said affidavit, affiant denies that on July 18, 1941, or at any other time, that said Court ordered your affiant to appear before a trial examiner of the Federal Trade Commission on July 22, 1941, or at any other time, to answer any questions relative to the quantitative formula for his product, Bonequet Tablets, except, however, that affiant admits that on July 18, 1941, said Court directed your affiant to appear before a trial examiner of the Federal Trade Commission on July 22, 1941, and to answer the question "What are the proportions of the different ingredients used in Bonequet Tablets?" and alleges that said direction was an oral pronouncement of said Court;

4. That in connection with paragraph No. "6" of said affidavit, your affiant denies generally and specifically each and every allegation contained therein;

5. That your affiant has been once in jeopardy on account of the purported Order Compelling Obedience to Subpoena made herein on May 23, 1941, by Honorable Paul J. McCormick, a Judge of said Court;

6. That affiant hereby refers to and makes a part hereof with the same force and effect as though fully set forth herein all the matters and things set forth

in the Affidavit of Frederic A. Clarke in Re Contempt filed herein on July 18, 1941;

7. That the question "What are the proportions of the different ingredients used in Bonequet Tablets?" and any and all other questions as to the quantitative amounts of the ingredients [87] used by your affiant in the manufacture of Bonequet Tablets were, on May 23, 1941, and ever since have been and now are, incompetent, irrelevant and immaterial, neither pertinent nor proper, nor in the interests of justice, nor do they tend to prove or disprove any issue in the proceeding then and now pending before the Federal Trade Commission entitled "In the Matter of Frederick A. Clarke, an individual, trading as Bonequet Laboratories, Docket No. 3660;" that the purported order of July 18, 1941, herein requiring this defendant to answer said question, is void and of no effect and is in excess of the jurisdiction of said Court;

8. That disclosure and publication of your affiant's trade secrets will irreparably injure and destroy your affiant's business, which consists of the manufacture and sale of Bonequet Tablets; that said disclosure and publication will deprive your affiant of his property without due process of law, and that affiant will not be compensated for the said taking of his said business; that the value of your affiant's said business is, and at all times herein mentioned has been, in excess of Three Thousand Dollars (\$3,000.00), lawful money of the United States of America.

9. That this Court has no jurisdiction to try or punish your affiant for contempt.

Wherefore, Affiant prays that the contempt proceeding initiated by, or based upon, said Affidavit and Order be dismissed and that your affiant, Frederic A. Clarke, be discharged therefrom and found not guilty, and for such other and further relief as may be just and proper in the premises.

FREDERIC A. CLARKE

Subscribed and sworn to before me, this 30 day of July, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk U. S. District Court,

Southern District of California

By J. M. HORN

Deputy

[Endorsed]: Filed Jul. 30, 1941. [88]

No. 1553-B-H

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

FREDERICK A. CLARKE,

Defendant.

ORDER ADJUDGING DEFENDANT IN
CONTEMPT OF COURT

This matter came on this day to be heard upon the rule heretofore issued on July 14, 1941 against

the defendant Frederic A. Clarke (named herein as Frederick A. Clarke) to show cause why he should not be punished for contempt of this court in refusing to obey the order of this court entered herein on May 23, 1941 ordering said defendant to appear and testify before a duly appointed trial examiner of the Federal Trade Commission in a certain matter now pending before the Federal Trade Commission entitled *In the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories*, Federal Trade Commission Docket No. 3660; and also upon the rule heretofore issued on July 28, 1941 against the said defendant to show cause why he should not be punished for contempt of this court in refusing to obey the order of this court entered herein on July 18, 1941, ordering said defendant to appear and testify before a trial examiner of the Federal Trade Commission on July 22, 1941 in the certain matter now pending before the Federal Trade Commission entitled *In the Matter of Frederick A. Clarke, an individual, trading as Boncquet Laboratories*, Federal Trade Commission Docket No. 3660, and then and there to answer the question, "What are the proportions of the different ingredients in the product Boncquet Tablets?";

And it further appearing to the Court from the motions and [89] affidavits of Merle P. Lyon, special assistant to W. T. Kelley, Chief Counsel of the Federal Trade Commission, the counter-affidavits of Eldon V. Soper, attorney for the defendant,

and after hearings upon said motions, affidavits, and counter-affidavits, and after arguments of counsel, and upon full consideration thereof, that the defendant Frederic A. Clarke is guilty of contempt of this court in refusing to obey the order of this court entered May 23, 1941, in that he failed and refused at a hearing held July 7, 1941 before a trial examiner of the Federal Trade Commission in Federal Trade Commission Docket No. 3660 to answer certain relevant and proper questions propounded to him relative to the quantitative formula for his product Boncquet Tablets; and that he persisted in, and still remains in, contempt of this court in that he refused and still refuses to obey an order of this court entered on July 18, 1941 wherein he was ordered and directed to appear on July 22, 1941 before a trial examiner of the Federal Trade Commission and then and there answer the question, "What are the proportions of the different ingredients in Boncquet Tablets?"; and the said defendant Frederic A. Clarke being now present before this court in person and by counsel, and the court being fully advised in the premises;

It is ordered and adjudged that the said defendant Frederic A. Clarke is guilty of contempt in his said disobedience of the lawful orders of this court as hereinabove set forth, and the judgment of this court is that he be confined in a county jail as may be selected by the marshal or the attorney general, and there retained until such time as he purges himself of such contempt by answering the

question, "What are the proportions of the ingredients used in Boncquet Tablets?", and at this time Mr. Clarke is ordered turned over to the United States marshal for the carrying out of this order.

July 30, 1941.

BEN HARRISON

United States District Judge

Enter

[Endorsed]: Filed Jul. 30, 1941. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

[90]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER OF
COMMITMENT FOR CONTEMPT

Notice is hereby given that the defendant herein, Frederic A. Clarke, sometimes known as Frederick A. Clarke, does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order made and entered herein on July 30, 1941, which adjudged this defendant in contempt of said Court in his disobedience of the orders of said Court as set forth in said order here appealed from, and which directed that this defendant be confined in a county jail as may be selected by the Marshal or the Attorney General, and there retained until such time as he purges himself of such contempt by answering the question "What

are the proportions of ingredients used in Bonquet Tablets'', and from the whole of said order.

Dated: July 31st, 1941.

OLIVER O. CLARK

ELDON V. SOPER

Attorneys for Defendant

Service of the within Notice of Appeal is hereby acknowledged this 31st day of July, 1941. Federal Trade Commission, Petitioner, by Merle P. Lyon its attorney.

[Endorsed]: Filed Jul. 31, 1941. [91]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 103 inclusive contain full, true and correct copies of Application for Order Requiring Defendant to Appear and Give Evidence; Order Compelling Obedience to Subpoena; Motion for Order Recalling and Vacating Order; Notice of Motion; Order Shortening Time; Affidavit of Frederic A. Clarke dated July 1, 1941; Affidavit of Merle P. Lyon dated July 8, 1941; Demurrer to Affidavit of July 8, 1941; Motion of Plaintiff July 14, 1941, for Order to Show Cause; Affidavit of Merle P. Lyon July 14, 1941, with Exhibits A, Complaint, and B, Answer, attached there-

to; Order to Show Cause dated July 14, 1941; Demurrer to Affidavit of July 28, 1941; Motion of Frederic A. Clarke July 18, 1941, with Exhibit A, Copy of Portion of Reporter's Transcript of Proceedings before Examiner for the Federal Trade Commission, attached thereto; Order dated July 18, 1941, Directing Defendant to Answer, filed July 28, 1941; Notice of Motion on Petition filed July 28, 1941; Petition for Order Adjudging Defendant in Contempt filed July 28, 1941; Motion for Order to Show Cause filed July 28, 1941; Affidavit of Merle P. Lyon filed July 28, 1941; Order Directing Defendant to Show Cause filed July 28, 1941; Demurrer to Affidavit of July 28, 1941; Motion of Defendant to Strike Portions of Affidavit of July 28, 1941; Affidavit of Frederic A. Clarke filed July 30, 1941; Order Adjudging Defendant in Contempt of Court filed July 30, 1941; [104] Notice of Appeal; Order of Supersedeas; Supersedeas Bond; Order Extending Time to Docket Appeal dated Sept. 9, 1941; Order Extending Time to Docket Appeal dated Sept. 19, 1941; Designation by Appellant of Record on Appeal; Designation by Appellee of Additional Record on Appeal; which together with the Reporter's Transcript of Proceedings before the Court, including therein the Oral Opinion of the Court, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for copying, comparing, correcting and certifying the

foregoing record amount to \$20.15 and that the said amount has been paid to me by Appellant.

Witness my hand and the seal of the District Court of the United States for the Southern District of California this 9th day of October, A. D. 1941.

(Seal)

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH,

Deputy. [105]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Appearances:

For the Petitioner:

Merle P. Lyon, Attorney, Federal Trade
Commission, Washington, D. C.

For the Defendant:

Eldon V. Soper, Esq., 510 South Spring
Street, Los Angeles, California.

Reported by A. Wahlberg. [1*]

Los Angeles, California

Friday, July 18, 1941, 2:10 o'clock P. M.

Mr. Soper: May it please the Court, before we proceed with any argument I should like to ask that there be an amendment to the affidavit, on page 2 at line 5 of Mr. Clarke's affidavit, by adding thereto the words: "That said affidavit does not state facts sufficient to constitute a cause of contempt against your affiant."

The Court: How can you amend an affidavit made by someone else?

Mr. Soper: Mr. Clarke is in court, and it is customary, I understand, that when a person is in court that such amendment is permissible. It is merely an oversight in not stating that particular fact at that point.

The Court: It is satisfactory to the Court, if there are no objections. As far as that is concerned, failure to state grounds is always available.

Mr. Lyon: I have no objection to it especially, except that it was also in the demurrer which was overruled by your Honor. Of course I don't want to be technical or take advantage of any technicalities.

The Court: Where is the change?

Mr. Soper: Page 2, line 5.

The Court: You want to add what? [12]

Mr. Soper: "That said affidavit does not state facts sufficient to constitute a cause of contempt against your affiant."

The Court: All right. You may proceed.

Mr. Lyon: If the Court please, this is a hearing on a motion made by the Federal Trade Commission, made through its duly authorized trial attorney, for an order to show cause against the Defendant, Frederick A. Clarke, why he should not be held in contempt of this Court for refusing to obey a subpoena of the Federal Trade Commission and to testify pursuant thereto.

Now, briefly, the background of this matter is as follows: A complaint was issued by the Federal Trade Commission in December of 1938 against the Defendant in this case, the Respondent in the Federal Trade Commission case, under Docket 3660, in which the Defendant was charged with false and misleading advertising in connection with the sale and distribution of a medicinal product known as Bonequet Blood Building Tablets.

The Court: I might state that I have read the application and from that application I appreciate the issues in the case.

As I understand it, there is no denial, is there, that Mr. Clarke refused to answer questions which, in effect, would have required him to have revealed the formula of his product? [13]

Mr. Soper: That is true, your Honor; the precise quantitative amounts.

The Court: Yes. And there is no question in this case but what Mr. Clarke's business is such that it comes within the term "interstate commerce"?

Mr. Lyon: No question about that.

The Court: I am asking Mr. Soper.

Mr. Soper: I think that is true, that he actually manufactures goods that are sold in interstate commerce.

The Court: And there is no dispute about the fact that the complaint was filed as attached to the application and that the answer was filed as attached to the application, that the Federal Trade Commission issued subpoenas to Mr. Clarke, and that in pursuance of those subpoenas that he did appear at such hearings, I believe as shown by your affidavit attached to the application, questions were asked relative to his formula, which he refused to reveal, that thereafter an application was made to this Court for an order requiring him to appear and testify, that in pursuance of that order Mr. Clarke did appear and did testify but refused to answer a certain specific question which, in effect, required him to reveal his formula. He did testify to the various ingredients in his formula, but refused to testify to the proportion of each.

Mr. Soper: I think I can agree with all of that statement except we do not in our affidavit state what particular [14] questions Mr. Clarke declined to answer on the former hearings.

The Court: I thought in your affidavit there was a copy of the transcript.

Mr. Soper: Of the last hearing, yes.

The Court: That was broader than the one that was submitted to me by the questions that were attached.

Mr. Lyon: It included more of the testimony, I will say that.

The Court: I might state that I think on page—your pages are not numbered, but it shows this question was asked, “What are the proportions of those different ingredients.”

Answer: “Of course, that is my trade secret.”

Then there was some discussion and then Mr. Clarke said: “Well, I decline to answer, to divulge this trade secret.”

Then the Trial Examiner said: “Now, the only thing I can ask you is: Do you decline to answer on the ground that your answer would tend to incriminate or degrade you?

“The Witness: Well, it wouldn’t tend to incriminate or degrade me. It would deprive me of my constitutional property, my constitutional rights.”

Then it is made to appear there that the question was asked and very definitely Mr. Clarke refused to answer the question: “What are the proportions of those different [15] ingredients” after he had theretofore set forth the ingredients that entered into his product.

Mr. Soper: Yes, your Honor.

The Court: Doesn’t that bring it down, gentlemen, to just a cold question of law?

Mr. Lyon: I believe it does; yes, sir.

The Court: As to whether or not the Federal Trade Commission at a hearing can compel a witness to reveal a trade secret. Doesn’t it bring it down to that point and that issue?

Mr. Lyon: I might further state, your Honor—

Mr. Soper (Interrupting): I think that is the question, your Honor, and it is a very serious question.

The Court: To me, of course, not attempting to interfere with any person's rights or technical rights, the Court is interested in getting down to the gist of it, and the real problem before us and deciding that point insofar as this Court has the power to do so.

Mr. Lyon: This, I believe, is a case of first impression, and for that reason is a very important matter for the Federal Trade Commission as well as the Respondent. [16]

Now, of course, I recognize that Mr. Clarke is not a voluntary witness and he didn't waive any privilege, in fact, he has been maintaining and trying to sustain his privilege all through this case; but I submit that in a case such as we have here, where the rights of the public at large are involved and the protection of the public against false and misleading advertising is involved, we have a situation where the Federal Trade Commission in its efforts to protect the public will be seriously handicapped if the aid of a court of equity is given to a defendant to enable him to refuse to give the formula for his product to the Commission, and I very seriously doubt that there will be any possible injury to any competitors by reason of such disclosure. As a matter of fact, the only persons to whom such a formula would be disclosed would be doctors and other expert witnesses.

The Court: It would become public property. Your findings and records are public, are they not?

Mr. Lyon: The findings are public, and, of course, the testimony is public.

The Court: Then it becomes a part of the public record.

Mr. Lyon: In the sense that it is a public document kept in Washington.

The Court: Anybody that is interested in ascertaining his formula would have access to it.

Mr. Lyon: That is right. I appreciate that. But this [31] matter can be taken care of very easily by holding the sessions of the Federal Trade Commission hearing in secret and allowing nobody to enter the hearing room except the witnesses, and not to disclose the formula upon the record itself, but the formula can be shown to the witnesses outside of a hearing and their opinion based thereon, and the transcript of the testimony itself therefore will not show what the formula is. In other words, it will be a matter for the Commissioner's knowledge alone.

The Court: The way I feel about that point is this—and I might as well be frank about it—in other words, I don't think there is any question but that this is a valuable trade secret and testimony as to it will be revealing it. I do not think there is any question that such revelation opens the door wide for serious injury to Mr. Clarke.

However, is that of any materiality in the issue before the Court? The sole question is, What is

material to the issues in this case, and then Mr. Clarke declined to answer on the ground that it is a trade secret. Whether or not it will bring injury to him is not a matter for this Court to pass upon. I wouldn't waste any time in the argument here if it is proper for this Court to consider the probabilities of a private wrong or private injury. [32]

Mr. Soper: May it please the Court, may I offer in evidence the application or the order requiring giving of evidence and the order compelling obedience to subpoena in this proceeding, the latter being dated May 23rd—

The Court (Interrupting): It is a part of the record now.

Mr. Soper: It is before the Court. I just want it to be clear that it is a part of the record. It is the only order and terms in the file. [33]

Mr. Soper: If I may have just one short word, your Honor.

In connection with Mr. Lyon's statement in regard to physical tests of this product, I now stipulate that Mr. Clarke—I stipulate for him—will bear the expense of any tests which are necessary or advisable to determine the efficacy of this product in the matter now pending before the Federal Trade Commission. I make that stipulation in open court and for all purposes in this proceeding. [46]

OPINION OF THE COURT

The Court: Gentlemen, this presents an interesting and intriguing question of law, one that has interested the Court considerably. I have not only been interested in studying and reading the authorities submitted by counsel on both sides, but have spent considerable time in independent research. And it is true that there is a conflict in authorities, and some of the conflicts cannot be reconciled, in my way of thinking. [49]

In this case the facts are virtually agreed to, but there is a wide difference of opinion as to the law that is applicable to those particular facts.

The affidavit and answer recognizes the fact that the complaint was filed before the Federal Trade Commission after the effective date of the 1938 amendment. An answer was filed, Mr. Clarke appeared before the Commission at a hearing, answered certain questions and refused to answer such questions as would tend to reveal the formula of his product, claiming that it would be revealing a trade secret. Upon that basis he declined to answer.

An order for an application was made to the Court for an order requiring Mr. Clarke to appear and to give evidence and, in pursuance to that order, Mr. Clarke did appear and did give evidence, but declined to answer the question, "What are the proportions of those different ingredients?" which question followed the testimony of Mr. Clarke wherein he testified concerning the various ingredi-

ents that went into his products, but he declined to reveal the proportions of each ingredient.

It seems to me that in view of the language of the complaint filed by the Federal Trade Commission under the 1938 amendment, the Commission had jurisdiction to conduct the hearing. It also appears to me that the question as to the contents of his product or the formula was a material question. So it comes down to the question as to whether or not [50] Mr. Clarke could refuse to testify on the ground that it would tend to reveal a trade secret.

Under Section 46 of Title 15, U. S. C. A. under subdivision (f), it would appear that it was contemplated that under some circumstances there would be revealed to the Federal Trade Commission trade secrets.

The powers of the Commission are broad and the scope of its investigative powers is also broad, providing that a proper complaint has been filed indicating that the Commission has jurisdiction.

Counsel for Mr. Clarke has cited a number of cases on page 3, particularly the case of Federal Trade Commission v. P. Lorillard Company, 283 Fed. 999, and I think that the three cases there cited all hold in substance the same.

I notice in this case of Federal Trade Commission v. P. Lorillard Company, the case in 283 Fed., this language:

“It was not intended to grant an unlimited power of inquisition or an unlimited right of

access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrongdoing.”

That case naturally wouldn't apply to the case at bar, for there is a complaint charging wrongdoing.

Of course, some of the other cases go off on the question of whether or not the parties are engaged in interstate [51] commerce. In this case that question is not involved because it is recognized by both parties that Mr. Clarke is so engaged.

I have read this case of *Carver v. Pinto Leite*, found in 7 Law Reports, page 90, also the case of *Tetlow v. Savournin*, 15 Phila. 170, and other Federal cases cited by counsel for Mr. Clarke. There is no question in the Court's mind but that that Philadelphia case and the case found in the Law Reports tend to uphold him in his position.

Reference is also made to the case of *United States v. Basic Products Company*, 260 Fed. 472 and, like I mentioned a moment ago, that case went off on the fact that the party against whom the complaint had been filed was not engaged in interstate commerce.

I feel that the case of *Moxie Nerve Food Company v. Beach*, 35 Fed. 465, also tends to uphold Mr. Clarke's counsel, as well as the *Star Kidney Pad Company v. Greenwood*, 3 Ontario Reps. 280.

However, I doubt whether, if that case were tried

in an American court, that an American court would hold as it was held in that case. That was a case where a suit was had on a promissory note that had been given for certain pads, and the defense was that the notes were obtained by a fraudulent representation, and I believe that our present-day method of trying cases would have permitted the defendant to have demonstrated that the pads were not as repre- [52] sented. And while the Court did say in there, "That question would have to be solved by the experience of the sufferer rather than the skill of an expert, and the composition of the pads having formed no part of the inducement of the defendant to buy them," it indicates that the composition and the representations as to composition were not the real issue.

It is rather interesting to note that the cases that tend to uphold Mr. Clarke's position are, most of them, from 60 to 70 years old. I do not mean to infer that a rule that was recognized by a court in 1871 or 1881 or 1883 should be disregarded because of the lapse of time, but it is interesting because it indicates a trend of authorities.

I feel, as I stated before, that the question was material to the issue being tried by the Commission and that Mr. Clarke should have answered the question unless, as stated, that it be deemed a trade secret.

I also feel that in referring to the cases cited by Mr. Clarke's counsel by reason of their age have

been, to a marked extent, overruled by more recent cases. The tendency of courts and of fact-finding bodies is to find the most direct method of ascertaining the truth.

I think that, was boiled down and very clearly set forth in the case of *Funk v. United States*, 290 U. S. 371, wherein the court states:

“The fundamental basis upon which all rules [53] of evidence must rest if they are to rest upon reason is their adaptation to the successful development of the truth, and since experience is of all teachers the most dependable, and since experience is also a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the falsity or unwisdom in the old rule.”

If I remember correctly, that case goes into the question and discusses somewhat the matter of privilege, and tends to restrict privileges afforded to witnesses wherever the granting of such privilege would tend to withhold the truth from the court.

We have a case from our own district entitled *Perkins Oil Well Cementing Company v. Owen*, 293 Fed. 759, wherein Judge James wrote the opinion. Among other things, he said:

“Courts have held, and not a few of them, especially in earlier decisions, that the mere

fact that a party might in a suit, even a civil one, be required by the judgment to pay a sum in excess of a compensatory amount to his adversary, would entitle him, when examined as a [54] witness, to claim the privilege. This was extending the constitutional protection under the plea of analogy to a limit which is not now recognized to be reasonable. In 28 Ruling Case Law, p. 455, the editor gives expression to what seems to be the modern rule, where it is stated:

“ ‘However, it has been held that the privilege of a witness does not apply to penalty of a purely remedial character, and the distinction between the provisions of a remedial statute for the enforcement of the remedy and a penal statute has been stated to be that the penalty imposed by the remedial statute is not imposed as a punishment for a public wrong, but as a redress for a private grievance.’ ”

Now, you take again, following some of the authorities cited by counsel for Mr. Clarke, he cites Wigmore and he underlines this part:

“What the state of the law actually is would be difficult to formulate precisely. It is clear that no absolute provision for trade secrets is recognized. On the other hand, courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth.” [55]

In the first place, that citation recognizes that there is no absolute provision for the protection of a man and his trade secrets, and he is required to disclose them except where it is not indispensable for the ascertainment of the truth.

I believe there is another citation that also recognizes that. In the case of *DuBois v. Thomas*, 122 Southern 495 and 154 Miss. 286, referred to in Mr. Clarke's counsel's memorandum, it is cited to show that where a trade secret is relative to an issue being tried, and its disclosure is essential in order that the issue may be correctly determined and justice administered, a witness is not privileged to refuse to disclose it. The case of *DuBois v. Thomas*, found in 122 Southern at 495, clearly makes it incumbent upon a witness to reveal his trade secrets.

We also have the case *In Re Edge Ho Holding Corporation*, 176 N. E. 537, which tends to so hold, as well as other cases cited by counsel for the Commission, which it is not necessary to review.

But after a careful study I feel confident that the present tendency of the law is to require a person to answer questions that are necessary to be answered in the ascertainment of the truth.

We have here a number of cases in which the litigants were private parties and only private rights were involved. In this case we have as the moving party the Federal Trade [56] Commission which, in effect, is the Government itself acting in the interests of the public, because if its activities

were not in the interests of the public, it would not have the right to conduct such hearings.

It seems to me that the question asked is material, that in order to ascertain the facts it will be necessary for the witness to answer the question heretofore referred to.

I am not unmindful of the fact that this may work a hardship on Mr. Clarke. I approached this question really as a mediator between the parties because I felt, when it was first presented to me, that Mr. Clarke was perfectly justified in taking the position that he took. But after studying the authorities and giving it considerable thought, I feel that the position of the Federal Trade Commission is correct.

I also recognize the fact that there is a probability that the revealing of this trade secret may be injurious to Mr. Clarke, but private rights must give way where the good order of society is involved.

It seems to me that it would be a very peculiar situation that the Federal Trade Commission, in holding hearings, could not obtain answers to material questions. Counsel has questioned the jurisdiction of this Court and the proceeding by which we have arrived at the present point in the proceedings, but if Mr. Clarke would decline to answer [57] such questions it would absolutely thwart the Federal Trade Commission in its investigation promulgated by reason of the complaint.

I feel that it is going to be incumbent upon Mr. Clarke to answer the question as to what are the proportions of the different ingredients contained in his product.

I do not feel inclined at this time to unceremoniously direct a commitment against Mr. Clarke for contempt, because I feel that this is a serious question and he is entitled to his day in court to have the matter heard and passed upon, and I am going to give Mr. Clarke an opportunity to answer the question. Of course, if he desires to stand pat and not answer the question, the Court will be called upon and compelled at that time to exercise whatever authority it may have. It may even become necessary for the issuance of a commitment.

I think in that respect that the parties involved should not overlook the fact that not only are we involved here with a question of a commitment for contempt, but if the Commission had seen fit they could have proceeded under Section 50 of Title 15 U. S. C. A., which provides a very severe penalty, of a fine of not less than \$1,000 nor more than \$5,000, or for not more than one year in jail, or both such fine and imprisonment. It isn't the responsibility of the Court, but it will be a matter for the Federal Trade Commission to determine whether they want to proceed through [58] contempt or through criminal prosecution, or by both.

May I inquire as to when the present hearing is continued to?

Mr. Lyon: The present hearing has been continued to next Tuesday afternoon at 2:00 o'clock July 22, 1941, at Room 229 in the Post Office Building, Los Angeles, California.

The Court: It is the order of the Court that Frederick A. Clarke appear before the Trial Examiner of the Federal Trade Commission next Tuesday afternoon at 2:00 p. m., July 22, 1941, and there continue with his examination and testimony and answer the question, "What are the proportions of those different ingredients?" referred to in his examination heretofore taken and referred to in the transcript. If Mr. Clarke appears and answers the question, the Court will dismiss these proceedings, otherwise we will see you all again, gentlemen.

Mr. Soper: I appreciate the industry with which your Honor has approached this question, and I regret the apparent conclusion you have come to.

Mr. Lyon: May we have a short continuance of this case for the purpose of ascertaining whether or not Mr. Clarke will answer the question?

The Court: If he fails to answer this, you will have to present it by a petition and order to show cause. [59]

Los Angeles, California

Wednesday, July 30, 1941. 11:05 o'clock A. M.

The Clerk: No. 1553-BH, Civil Federal Trade Commission v. Frederick A. Clarke, hearing on petition and order to show cause.

The Court: Mr. Clarke is back to show cause why he shouldn't be held in contempt. I would like to hear from counsel.

Mr. Soper: May it please the Court, I wish to make a brief explanation of our position.

The other day in the Federal Trade Commission hearing Mr. Lyon handed me a paper reading "Notice of Motion," and he dated it July 25, 1941. That was handed to me on July 25, 1941.

Attached to that paper was one reading "Petition for Order Adjudging Defendant in Contempt."

No service was made upon Mr. Clarke, and upon examination of Rule 20 of the rules of this court, it reads:

"Mondays shall be motion days on which all calendars will be called and upon which all motions and other matters shall be heard unless set for a particular day by order of the Court. When notice to the adverse party is required to be given, such notice shall be for a Monday unless the Court [60] for good cause shown, shall direct otherwise.

When there has been an adverse appearance, a written notice of motion shall be necessary. Such notice of motion shall be served upon the

adverse party, or his attorney, at least ten days before the time appointed for the hearing, unless the Court or one of the judges thereof shall, for good cause by special order, prescribe a shorter time, and shall be filed with the Clerk not later than 5:00 o'clock p. m. on the Thursday immediately preceding the Monday appointed for the hearing by the notice of motion.

* * *''

Now relying upon Rule 20 we did not appear last Monday and I was quite shocked to learn that your Honor had taken exception to that. Mr. Lyon so informed me yesterday. Of course, no order from the Court had been delivered to either of us and I assumed that your Honor will naturally follow the rules and discharge the matter then.

The Court: Well, the matter is here today on order to show cause, and you have appeared.

Mr. Soper: I have appeared.

The Court: And Mr. Clarke is present here in pursuance to that order to show cause.

Mr. Soper: I called your Honor, and when I learned I was wanted in court today I said I immediately would appear.

Now I have prepared, in response to the papers which [61] were delivered to me, a demurrer, a motion to strike, and an answer, but this morning Mr. Clarke was served——

(Addressing the Defendant Clarke) Was it this morning?

The Defendant Clarke: Last night.

Mr. Soper: Last night—I am sorry—Mr. Clarke was served with some other papers and, as I understand it, they consist of an order directing the defendant to show cause, a motion for order to show cause, and affidavit supporting the motion to show cause.

Now Mr. Lyon has been kind enough to give me his copies of these papers, and I have never seen them until about one minute before your Honor took the bench this morning, so I haven't anything in response to those papers to offer at this time.

The Court: A written appearance is not required.

As I understand it, it is alleged here—and there is no dispute of the fact—that Mr. Clarke appeared at the hearing before the Federal Trade Commission as directed by the Court.

Mr. Soper: Yes, that is correct, your Honor.

The Court: And at that hearing he was asked, "What are the proportions of the different ingredients in Bonequet Tablets," and his answer was, "Well, I decline to answer the question because I would have to divulge my trade secrets and methods of manufacturing the product." [62]

Is that correct?

Mr. Soper: Well, may it please the Court, I think that is true, but we would like the opportunity to file an answer because I understand that contempt proceedings are tried upon pleadings which consist

substantially of an affidavit and counteraffidavit, or a petition and answer to petition.

In other words, I think it is *encumbent* upon us to present some sort of pleading, and I respectfully request that an opportunity be given to me to prepare such a pleading. I can be here this afternoon at 2:00 o'clock, and we can proceed upon the basis I have before me.

In response to the petition, I would like to offer a demurrer, a motion to strike, and then if it should become necessary, an answer.

The Court: Well, I think we will only proceed on the order to show cause.

Mr. Soper: That is, the order directing the defendant to show cause dated July 28, 1941?

The Court: Yes, based upon, I believe, an affidavit, is it not?

Mr. Soper: I believe it is.

Mr. Lyon: That was based upon a motion and affidavit.

Mr. Soper: Based upon an affidavit, I believe. Those are the papers I have not seen, your Honor, until just a moment ago. [63]

The Court: In other words, you want some time to file a responsive pleading?

Mr. Soper: If I may, your Honor, yes.

Mr. Lyon: If the Court please, I believe the situation is the same as it was on the 18th of July when the Court rendered an opinion holding the defendant in contempt of court and the defendant,

by his own admission, has refused to answer the question asked and which the Court directed the defendant to answer. I think we are just wasting a lot of time here if we have to have a formal answer to this order to show cause. We really have the original order to show cause and nothing else before us.

The Court: I think that is probably true, but the Court adopted this other procedure which may be, to a certain extent, surplusage, but I wanted to give Mr. Clarke a full opportunity to clear this matter up without the necessity of using the extreme power vested in the Court in contempt cases. I want to give him a full opportunity to purge himself, and there is only one question before the Court now, and that is whether or not Mr. Clarke refused to answer this question. That is the only thing the Court is interested in.

Mr. Soper: Well, of course, I take it, your Honor, that we will be permitted to present ourselves before the Court upon a proper record, and I wish to show your Honor papers which I am holding in my hand—I worked on those [64] late last night and early this morning and I have not been wasting my time in this matter.

The Court: Can you have it in by 2:00 o'clock?

Mr. Soper: I think I can, your Honor. I don't know. It is 11:15 now.

Perhaps if it was 3:00 o'clock, would it suit your Honor's convenience just as well? An extra hour would be appreciated.

The Court: I am going to continue the matter until 3:00 o'clock so that counsel can present any affidavits or motions that they desire to make. [65]

I am going to continue the matter until 3:00 o'clock and direct Mr. Clarke return here at that hour. That means 3:00 o'clock sharp, gentlemen.

Mr. Lyon, the Court feels that the matter should be fully reported so the record will be complete. I am going to direct that the reporter report these proceedings, and also those at 3:00 o'clock.

Mr. Lyon: Very well, sir.

(Thereupon, at 11:20 o'clock a. m., a recess was taken until 3:00 o'clock p. m. of the same date.) [66]

Los Angeles, California

Wednesday, July 30, 1941

3:00 O'clock P. M.

The Court: Proceed.

The Clerk: Federal Trade Commission vs. Clarke.

Mr. Soper: May it please the Court, before anything else is taken up, I wonder if the name of Mr. Clarke as it appears on the title of this proceeding could be corrected. Mr. Clarke's first name is spelled F-r-e-d-e-r-i-c A. C-l-a-r-k-e. I think it would be well at this time to correct the misnomer in the title as it appears in the papers of this proceeding.

The Court: Do you have anything else that you wish to present, Mr. Soper?

Mr. Soper: Your Honor, I take it that the motion for the correction is granted?

The Court: Yes. That will be corrected.

Mr. Soper: I present at this time to counsel and to the Clerk of the Court a demurrer—may I just hand it up?

The Court: Yes.

(The document was passed to the Court.)

The Court: The demurrer will be overruled.

Mr. Soper: At this time may I have an exception noted in the record?

The Court: Yes. [67]

Mr. Soper: At this time we wish the record to show that I am now serving upon Mr. Lyon, attorney for the Commission, a motion to strike.

The Court: On what proceeding do you base a motion to strike an affidavit?

Mr. Soper: Well, because the affidavit here represents the pleading of the Commission.

The Court: That motion will be denied.

Mr. Soper: May I have an exception to that?

The Court: You may have an exception.

Mr. Soper: Your Honor may not have noticed that this is an attempt to vary or contradict a judicial record by parol or extrinsic evidence.

The Court: The Court is familiar with it.

Mr. Soper: At this time we will file with the Court a copy of our reply to the affidavit, Frederic A. Clarke, in re contempt No. 2.

The Court: What is your point in Paragraph 3 of your affidavit to the effect that I didn't direct him to appear and answer that question?

Mr. Soper: The only question your Honor ordered him to appear to answer "What are the proportions of the different ingredients used in Bonquet tablets."

The Court: That is the only question I am interested in, as far as the contempt proceedings are concerned.

Mr. Soper: That is the only question, to the best of [68] my recollection, that your Honor ordered him to answer.

I also state this, your Honor, that this morning after we adjourned I looked at the file in this proceeding—I couldn't find it in the Clerk's office—and I came and talked to your Honor in chambers to see if you had it, and then I directed your Honor's attention to what was my best recollection that your Honor had not found Mr. Clark in contempt heretofore.

The Court: At that time I directed him to answer a question instead of finding him in contempt. I wanted to give him an opportunity to purge himself if he felt so inclined.

Mr. Soper: That is my recollection. I was very much disturbed. I went to the Clerk's office to find an order which was filed in this case, dated July 18, 1941, which recites some other things, and I find Mr. Clarke was in contempt of court.

The Court: He was not in contempt. Instead of judging him in contempt, I gave him the opportunity to purge himself. I was just trying to be decent to Mr. Clarke.

Mr. Soper: I didn't mean it that way. I am sorry if the thought occurred to you. I didn't want the record to show that he was found guilty of contempt and have the same thing occur again.

The Court: I gave him an opportunity to purge himself. Now, as I understand it, there is no question—I might state that if I felt this way the other day—perhaps if the [69] Court had used a little better judgment it would have continued this matter over and given him an opportunity to answer the question, rather than to have directed him to and then requiring another order to show cause. I feel, in effect, that this is the same thing because Mr. Clarke is now before this Court for failure to comply with that order. The Court has jurisdiction, so this is more or less of a continuing matter, and I consider this hearing today a continuation of the hearing of the other day, at which time I gave him an opportunity to answer the question.

As I understand, it is admitted that at the time of the hearing the question was asked: "What are the proportions of the different ingredients used in Boncquet tablets," and Mr. Clarke at that time refused to answer that question. Is that not true?

Mr. Soper: That is correct, your Honor.

The Court: And he refused to answer claiming that it would require him to divulge a trade secret. That was the ground upon which he refused to answer.

Mr. Soper: Trade secrets and method of manufacture.

The Court: There is no method of manufacturing involved in this question.

As I understand it, they are not attempting to obtain his method of operation or manufacturing. Any secret that he may have in that is not involved in this. The only question involved as to this are the proportions of the ingredients [70] in the tablets.

Now, there has been no question here before the Court as to whether or not it was necessary for him to divulge his method of manufacturing this product.

Am I not correct in that, Mr. Lyon?

Mr. Lyon: That is correct, your Honor.

The Court: And heretofore, as the Court has indicated, the record discloses that there was a complaint filed by the Federal Trade Commission, that Mr. Clarke was subpoenaed to appear before that Commission and he refused to answer those questions which would have the effect of divulging the proportions of the various ingredients in his product; then thereafter the Court issued an order directing him to appear and testify, and in pursuance of that order he again refused to give the proportions of the various ingredients that go into his products; that he was cited before this Court to show cause why he shouldn't be punished for contempt for his failure to answer, and the Court spent considerable time not only in independent research, but in reading various authorities, and at that time the Court held that Mr. Clarke should have answered that question, rather than to adjudge him in con-

tempt and commit him at that time, I gave him an opportunity to purge himself.

That opportunity was afforded him, and he saw fit to still persist in refusing to comply with the order of this Court, and under these circumstances there is only one thing [71] the Court can do.

The Court at this time adjudges Mr. Clarke, also known as Frederick A. Clarke, also known as Frederic A. Clarke with the "k" off of Frederick guilty of contempt, and the judgment of this Court is that he be confined in a county jail as may be selected by the United States Marshal or by the Attorney General, and there detained until such time as he purges himself of such contempt by answering the question: "What are the proportions of the different ingredients used in Bonquet tables?" At this time Mr. Clarke is turned over to the United States Marshal for the carrying out of this order.

Mr. Soper: May it please the Court, might I note an exception in the record?

The Court: Yes.

I direct the attorney for the Federal Trade Commission to draw the commitment.

Mr. Lyon: Very well, sir.

Mr. Soper: I would appreciate it very much, pending an appeal on this proceeding, which we intend to take—I wish to announce at this time that we shall take an appeal—if Mr. Clarke might be released upon his own recognizance pending the appeal.

He is a businessman and has lived in the County for more than 25 years. I have known him about 20 years of that time myself. He is running a substantial business out here, [72] built solely by his own efforts, and we are engaged in certain litigation in the Superior Court in the State of California, and there is an order issued requiring that he be in attendance in that Court tomorrow morning at 10:00 o'clock.

The Court: He has a good excuse for not being there.

Mr. Soper: Well, of course, I had hoped, your Honor, that he might be released until this matter has been determined.

The Court: The Court doesn't feel so inclined. The Court feels that it has given Mr. Clarke every opportunity to answer this question. The Court has no feeling in this matter toward Mr. Clarke, but at the same time he stands here defying the order of this Court, and if this Court has any power to enforce its order—if it is a proper order—why, this is the proper procedure. He has selected this course after careful consideration and after advice by counsel.

Mr. Soper: I want to make myself clear upon that. I never advised anybody to violate an order of the Court, and if that is the impression——

The Court: You are not on trial.

Mr. Soper: Whether I am on trial or not, your Honor, I never advised anybody to violate an order of the Court.

Mr. Lyon: May I ask at this time whether the Court is willing to adjudge the cost in this matter, to award costs in this matter? [73]

The Court: This is purely a civil contempt matter for the purpose of enforcing the order of this Court, and if there is any other procedure it will have to be taken under criminal process.

Mr. Lyon: Does the Court feel that the Federal Trade Commission is entitled to a compensatory fine?

The Court: Not when it is a civil contempt. I don't feel under a civil contempt that this Court should do anything but direct him to comply with the order of the Court, and confine him until such time as he does comply with such order.

Mr. Lyon: I merely wanted to point out that the Commission has been put to considerable expense, several thousands of dollars, in the matter.

The Court: You selected your form of procedure. You elected to proceed through civil contempt. If this had been a criminal contempt, the Court could have then committed him for a definite period of time and imposed a fine, in addition to any penalty that might have been imposed to bring about a compliance with the order. Your statute provides for a criminal remedy, and whether or not the Department of Justice desires to proceed along that line, that is a matter for them to determine, but at this time I am going to only make one order.

Mr. Clarke will be remanded to the custody of the Marshal. [74]

(Whereupon, at 3:15 o'clock p. m., the above-entitled matter was concluded.)

[Endorsed]: Filed Sept. 30, 1941. [75]

[Endorsed]: No. 9948. United States Circuit Court of Appeals for the Ninth Circuit. Frederic A. Clarke, sometimes known as Frederick A. Clarke, Appellant, vs. Federal Trade Commission, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 11, 1941.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 9948

FEDERAL TRADE COMMISSION,

Appellee,

vs.

FREDERICK A. CLARKE,

Appellant.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD.

To the above named appellee and to Paul P.
O'Brien, Clerk of the above entitled Court:

Appellant intends to rely upon the following
points on this appeal:

I.

That the District Court of the United States for
the Southern District of California, Central Divi-
sion, was without jurisdiction to make the order
appealed from for the reason that it is a violation
of appellant's rights under the Fourth Amendment
to the Constitution of the United States, to compel
appellant to reveal the proportions of the various
ingredients as used in the product produced and
vended by him.

II.

That the order appealed from is void for the
reason that the Federal Trade Commission lacks

authority to require appellant to reveal the proportions of the various ingredients as used in the product produced and vended by appellant.

III.

That the order appealed from is void because the record upon which said order is based does not disclose any duty upon appellant to disclose his trade secret as to the proportions of the various ingredients as used in the product produced and vended by him, and that said record discloses that said matter is not within the jurisdiction of the Federal Trade Commission.

IV.

That the order appealed from is void for the reason that the questions asked of appellant, and which he refused to answer, and for which refusal the order appealed from was made, were not material or relevant or competent as to any issue as to which the Federal Trade Commission had jurisdiction or should be permitted to inquire of appellant in the proceedings in which said questions were asked.

DESIGNATION

Appellant designates the following parts of the record which he thinks necessary for the consideration of the foregoing points:

- (1) Application for Order Requiring Giving of Evidence;

(2) Order Compelling Obedience to Subpoena, May 23, 1941;

(3) Motion for Order Recalling, Annulling, and Vacating Order Compelling Obedience to Subpoena;

(4) Notice of Hearing Motion for Order Recalling Order;

(5) Order Shortening Time for Service of Notice of Hearing;

(6) Affidavit of Frederic A. Clarke in Support of Motion for Order Recalling, Annulling, and Vacating Order Compelling Obedience to Subpoena;

(7) Affidavit of Merle P. Lyon, dated July 8, 1941;

(8) Demurrer of Respondent to Affidavit of Merle P. Lyon;

(9) Motion of Petitioner, July 14, 1941, for Order to Show Cause;

(10) Affidavit of Merle P. Lyon, July 14, 1941, and Exhibit A, Complaint Docket, No. 3660, F. T. Commission Exhibit B, Answer of Respondent, No. 3660, F. T. Commission;

(11) Order to Show Cause dated July 14, 1941, Ret. July 18th;

(12) Demurrer of Respondent to Affidavit of July 14, 1941;

(13) Affidavit of Frederic A. Clarke, July 18, 1941 Exhibit A, Copy of Portion of Reporter's Transcript;

(14) Order Dated July 18, 1941, Directing Deft. to Answer;

(15) Notice of Motion on Petition for Order Adjudging Defendant in Contempt filed July 28, 1941;

(16) Petition for Order Adjudging Defendant in Contempt verified July 24th and filed July 28, 1941;

(17) Motion for Order to Show Cause filed July 28, 1941;

(18) Affidavit of Merle P. Lyon filed July 28, 1941;

(19) Order Directing Defendant to Show Cause, Returnable July 30, 1941, and filed July 28, 1941;

(20) Demurrer of Respondent to Affidavit of July 28, 1941;

(21) Motion of Respondent to Strike Affidavit of July 28, 1941;

(22) Affidavit of Frederic A. Clarke filed July 30, 1941;

(23) Order Adjudging Defendant in Contempt of Court, July 30, 1941;

(24) Notice of Appeal from Order of July 30, 1941;

(25) Opinion of the Court, Oral, Pages 49 to 59 inclusive of the Reporter's Transcript;

(26) That portion of the Reporter's Transcript of proceedings herein as follows:

(a) All of page 1 of said Transcript;

(b) All of pages 12, 13, 14, and 15, and to and including line 21 on page 16;

(c) All of page 31, and to and including line 23 on page 32;

(d) Commencing with line 16 on page 33, down to and including line 24, on said page 33;

(e) Commencing with line 16 on page 46, down to and including line 24, on said page 46;

(f) Commencing with line 18 on page 49, to and including line 26 on said page 49, and all of pages 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, and 64, and to and including line 11 on page 65;

(g) Commencing with line 8 on page 66, to and including line 17 on said page 66, and all of pages 67, 68, 69, 70, 71, 72, 73, 74 and 75.

Dated: October 9th, 1941.

OLIVER O. CLARK

Attorney for Appellant.

State of California,
County of Los Angeles—ss.

Frances A. Clary, being first duly sworn, says:

That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 1203 Garfield Building, 403 West Eighth Street, Los Angeles, California. That on the 9th day of October, A. D., 1941, affiant served the within Statement of Points on Which Appellant Intends to Rely on Appeal and Designation of Record on the Appellee in said action, by placing true copies thereof in separate envelopes addressed to

each of their Attorneys at the business address of each said Attorney, as follows:

Merle P. Lyon,
Attorney at Law,
Federal Trade Commission,
Washington, D. C.

William T. Kelley,
Chief Counsel for Federal
Trade Commission,
Washington, D. C.

and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. That there is delivery service by United States mail at the place so addressed; there is a regular communication by mail between the place of mailing and the places so addressed.

FRANCES A. CLARY

Subscribed and sworn to before me this 9th day of October, 1941.

(Seal) DAVID D. SALLEE
Notary Public in and for said County and State.

[Endorsed]: Filed Oct. 11, 1941. Paul P. O'Brien,
Clerk.

